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

FIRST SECTION

CASE OF LYKOURESOS v. GREECE

(Application no. 33554/03)

JUDGMENT

STRASBOURG

15 June 2006

FINAL

15/09/2006

In the case of Lykourezos v. Greece,

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

Loukis Loucaides, *President*,
Christos Rozakis,
Françoise Tulkens,
Elisabeth Steiner,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens, *judges*,
and Søren Nielsen, *Section Regisrar*,

Having deliberated in private on 23 May 2006,

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

PROCEDURE

1. The case originated in an application (no. 33554/03) against the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Greek national, Mr Alexandros-Léon Lykourezos ("the applicant"), on 9 October 2003.

2. The applicant was represented by Mr N. Alivizatos, professor at Athens University, and by Mr E. Kioussopoulou and Mr E. Mallios, of the Athens Bar. The Greek Government ("the Government") were represented by their deputy Agents, Mr S. Spyropoulos, Adviser at the State Legal Council, and Mr D. Kalogiros, Legal Assistant at the State Legal Council.

3. The applicant alleged that, on account of a revision of the Constitution making all professional activity incompatible with the duties of a member of parliament, he had been obliged to forfeit his parliamentary seat, although he received no fees for his professional activities. He relied on Article 3 of Protocol No. 1 and Article 8 of the Convention.

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1).

6. By a decision of 13 December 2005, the Chamber declared the application admissible.

7. The applicant and the Government each filed observations on the merits of the case (Rule 59 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 March 2006 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr M. APESSOS, Senior Adviser at the State Legal Council, *Agent*,
Mr S. SPYROPOULOS, Adviser at the State Legal Council,
Mrs S. TREKLI, Legal Assistant at the State Legal Council, *Advisers*;

(b) *for the applicant*
Mr N. ALIVIZATOS, professor at Athens University, *Counsel*,
Mr E. MALLIOS, of the Athens Bar, *Adviser.*

The applicant was also present.

The Court heard addresses by Mr Alivizatos and Mr Apessos and their replies to questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant has been a member of the Athens Bar since 1960. He stood in the parliamentary elections of 9 April 2000 in the first constituency of Athens as a candidate on the Nea Dimorkatia party's list. He obtained 44,387 votes and was elected as a member of parliament for a four-year term by decision no. 799/2000 of the Athens Court of First Instance.

10. On 18 February 2003 Mrs Apostolou, a voter in that constituency, lodged a complaint against the applicant with the Special Supreme Court, the judicial body which, under Articles 58 and 100 of the Constitution, had jurisdiction, *inter alia*, to remove a member of parliament from office in the event of disqualification. Mrs Apostolou referred, in particular, to the incompatibility between the office of a member of parliament and the fact that the applicant was practising as a lawyer. This incompatibility had been enshrined in the Constitution for the first time on the occasion of a constitutional revision in 2001. The new Article 57 of the Constitution now states that the duties of a member of parliament are incompatible with all professional activity, although it does provide for the introduction of exceptions through legislation. However, the implementing legislation was

never enacted, since, according to information submitted by the applicant, the Chamber of Deputies voted against the draft law in February 2003. Article 115 § 7 of the revised Constitution indicated that the rule on disqualification in question would come into force once the implementing legislation provided for in Article 57 had been enacted and, at the latest, on 1 January 2003 (see paragraph 16 below).

11. The hearing before the Special Supreme Court was held on 7 May 2003. Before that court, the applicant alleged, *inter alia*, that there had been a violation of Article 3 of Protocol No. 1 and argued that, until such time as the implementing legislation provided for in Article 57 of the Constitution had been enacted, the disqualification could not be applied. He also claimed that the disqualification could not be applied to members of parliament who had been elected prior to the revision of the Constitution. Submitting several documents in evidence, he added that he had ceased receiving fees as of 1 January 2003 and that he was carrying out his activities free of charge, with the result that he could not be deemed to be practising a profession within the meaning of Article 57.

12. On 3 July 2003, by judgment no. 11/2003, the Special Supreme Court allowed Mrs Apostolou's complaint and ruled that the applicant had forfeited his seat. In particular, the court dismissed the applicant's argument that he could not be deemed to be practising his profession because he had not received fees for his services since the rule on disqualification had come into force. However, three members of the court considered that "the concept of practising a profession is very closely linked to receipt of an income, particularly through a systematic and long-term activity carried out for the purpose of ensuring [the individual's] livelihood". With regard to the other arguments raised by the applicant, the Special Supreme Court found as follows:

> "... [A]s is clear from Articles 115 § 7 and 57 § 1, paragraph 3, of the Constitution, the constituent body, in adopting the rule whereby the duties of a member of parliament are incompatible with the exercise of any profession, did so not only with a view to ensuring the independence of members of parliament, but also to ensure that the latter are able to carry out their duties in the best possible conditions and without distraction ... At the same time, the Constitution delegated to Parliament the power to introduce exceptions to the [general] rule of professional disqualification, in other words, the power to list those professional activities which would be compatible with the duties of a member of parliament ... In addition, [the same provisions state that] the rule establishing the incompatibility between the duties of a member of parliament and the practising of any profession was to come into force, at the latest, on 1 January 2003 ..., even if the law indicating the professional activities that are compatible with the duties of a member of parliament had not been enacted by that date ... The only consequence of the failure to enact this legislation ... is that the rule on disqualification for members of parliament is applicable, without exception, from 1 January 2003 ... Further, the argument put forward by the applicant in his submissions to the effect that the disqualification is not applicable to members of the current Chamber of Deputies, since this would be contrary to the constitutional principle of legitimate expectation, must be dismissed as unfounded, especially since

a constitutional provision cannot be set aside on the ground that it is contrary to another provision or principle of the same Constitution. This follows from the formal equality of all provisions of the Constitution and the principles arising from them, which requires that each constitutional provision be applied in a binding manner with regard to the specific area which it governs ..."

13. In July 2003 the applicant was replaced as a member of the Chamber of Deputies by the first substitute on his party's list for the first constituency of Athens.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

14. At the time of the parliamentary elections of 9 April 2000 in which the applicant was a candidate, Article 57 § 1 of the Constitution was worded as follows:

"The duties of a member of parliament are incompatible with the functions or position of a member of a board of directors, chairperson or director general or their deputies, or of an employee of a commercial firm or enterprise enjoying special privileges or public service concessions or receiving a regular State subsidy."

15. The new Article 57 of the revised Constitution provides:

"1. ... [paragraph 3] The duties of a member of parliament are also incompatible with the exercise of any profession. Activities compatible with parliamentary office, as well as matters relating to insurance and pension issues and to the manner in which members of parliament return to their profession at the end of their parliamentary term, shall be specified by law. ...

[paragraph 4] Violation of the provisions of the present paragraph shall result in forfeiture of parliamentary office and shall render related contracts or other acts null and void, as specified by law.

..."

16. The transitional provision of Article 115 § 7 of the Constitution provides:

"The incompatibility of parliamentary office with the exercise of any profession, provided for by the penultimate paragraph of Article 57 § 1, shall come into force upon promulgation of the law provided for in the same provision and on 1 January 2003 at the latest."

17. In December 2005 the present government announced its intention to carry out a further revision of the Constitution. On 17 January 2006 Mr Karamanlis, the current Prime Minister, presented the broad outlines of the proposed revision to his party's parliamentary group. He stated, *inter alia*: "recent experience shows that it is necessary to amend the constitutional provision on the professional disqualification of members of

parliament; we propose lifting the absolute prohibition and replacing it with a partial prohibition."

B. Minutes of parliamentary sittings

18. During the sittings of 13 and 20 January 1998 of the parliamentary committee responsible for preparing the revision of the Constitution, members of the opposition expressed their views as follows (extracts):

Mr Souflias:

> "I suggest adding a provision to Article 57 which would read as follows: *the duties of a member of parliament are incompatible with the exercise of any professional activity*."

Mr Panagiotopoulos:

> "Constitutional provision: *a member of parliament may not exercise any other profession*."

Mr Varvitsiotis:

> "I believe that a member of parliament should not exercise any other professional activity during his or her term of office."

In its final report of 30 March 1998, the above-mentioned parliamentary committee proposed that Article 57 of the Constitution be amended, and expressed its opinion as follows:

> "It is proposed, by a large majority, to revise Article 57 in order to redefine the work, powers and activities which are incompatible with the duties of a member of parliament in order to take account of current information about the State's role in the economy. Forfeiture of one's parliamentary seat is also foreseen as a sanction for exceeding the limit set on election expenditure."

In its report of 23 October 2000, the parliamentary committee responsible for preparing the revision of the Constitution after the elections of 9 April 2000 made no mention of the introduction of an absolute professional disqualification.

19. At the sitting of 28 February 2001, Mr Yannopoulos, a member of the majority parliamentary party and a former Minister of Justice, spoke as follows (extract):

> "What type of Parliament do you want? Do you want to exclude scientists and well-known figures? ... This prohibition exists in no other country ... You will find yourselves in the dock at the European Court of Human Rights, since a legislative prohibition on being elected to Parliament on the ground of one's profession amounts to a breach of every citizen's personality rights ..."

20. At the sitting of 6 April 2001, Mr Pavlopoulos, a member of parliament, then spokesperson for the opposition and currently Minister of the Interior, stated (extract):

"... The initial philosophy underlying the revision of this Article was that members of parliament could exercise professional activities with the exception of those prohibited by the Constitution; this is the logic of the decision [that we adopted within the revision committee]. Yet now, before a plenary sitting of the Chamber, you are putting forward a position that is the exact opposite of that ... All of a sudden, in the middle of the procedure, you are introducing an amendment which, in reality, completely overturns the content of the revision of Article 57 ... This is not a simple amendment, but a total reversal of the logic underlying the revision of Article 57."

III. COMPARATIVE LAW

A. Various types of disqualification

1. Disqualifications related to the separation of powers

21. Several legislative systems make it incompatible to hold a seat in Parliament and simultaneously to hold senior office in the executive branch (Head of State, Prime Minister, Minister or Minister of State) or high office within the judiciary (president or member of a constitutional or supreme court, of an administrative court, of the *Conseil d'Etat* or of another specialised senior court, such as the Audit Court). This is the case, for example, in Austria (Articles 61, 92 § 2, 122 § 5, 134 § 4 of the Federal Constitutional Law), Belgium (Article 50 of the Constitution), Spain (Article 70 of the Constitution and section 6 of the 1985 implementing Law on the general electoral system), Estonia (section 7 of the Parliamentary Rules of Procedure Act), Finland (Article 27 of the Constitution), France (Chapter IV of the Electoral Code), Luxembourg (Article 54 of the Constitution), "the former Yugoslav Republic of Macedonia" (section 9 of the Status of Members of Parliament Act 2005), the Netherlands (Article 57 § 2 of the Constitution) and Portugal (section 5 of the Assembly of the Republic (Elections) Act and section 20(1) of the Status of Members of Parliament Act). In some countries, however, government ministers take part in parliamentary work (Spain, Poland, Romania).

2. Disqualifications related to the principle of independence

22. Certain disqualifications from holding a parliamentary seat concern positions which could jeopardise parliamentarians' independence as a result of hierarchical relations within the government.

23. In the majority of countries, disqualifications of this type concern judges and prosecutors, police officers and members of the armed forces, and all diplomatic and consular staff. This is the case, for instance, in Bosnia and Herzegovina (section 1(8) of the Elections Act), Spain (Constitution), France (Chapter IV of the Electoral Code), Ireland

(section 41 of the 1992 Elections Act), Italy (sections 7, 8 and 9 of the Elections Act), Malta (Article 54 of the Constitution), the United Kingdom (section 1(1) of the 1975 House of Commons Disqualifications Act) and Slovakia (Article 77 of the Constitution).

24. In general, such disqualifications concern civil servants or contract workers employed in the State administration or in regional bodies, autonomous State entities or institutions such as the social security service, or in public companies. This is the case, for example, in Germany (section 8 of the Members of the *Bundestag* Act), Andorra (section 17 of the 1993 Electoral System and Referendums Act), Belgium (Disqualifications Act of 6 August 1931), Bulgaria (Article 68 of the Constitution), Spain (section 157 of the 1985 implementing Law), Estonia (Article 63 of the Constitution), Hungary (Article 9 of the Status of Members of Parliament Act 1990), Portugal (Article 157 of the Constitution), the Czech Republic (section 12(a) of the Conflict of Interests Act) and the Russian Federation (Article 97 of the Constitution).

25. In the majority of countries, individuals affected by those disqualifications must resign if they wish to stand for election (as in Bosnia and Herzegovina). In other countries (such as Austria or Belgium) they may merely request to be suspended from their professional duties during their term of office.

3. Disqualifications related to the existence of conflicts of interest

26. As a general rule, the disqualifications in this category concern managers or heads of companies, corporations or public or private institutions which have interests in State activities or which receive State aid or grants. They may also concern the chairpersons, general managers or members of the boards of directors of private companies involved in public construction or in property or credit operations (among many other countries, Bulgaria, Spain, France and Italy have such rules).

4. Disqualifications arising from the requirement to carry out parliamentary duties on a full-time basis

27. In some countries, members of parliament may not practise any professional or commercial activity or paid employment during their terms of office, except in the educational sphere, and then only in very exceptional circumstances (Spain, Lithuania, Russia).

B. Principles applicable to the profession of lawyer

28. The majority of countries do not lay down, in their constitutional or ordinary legislation, an incompatibility with freely practising the profession of lawyer (for example, Andorra, Austria, the Czech Republic, Bosnia and

Herzegovina, Estonia, Finland, Hungary, Ireland, Italy, the Netherlands, Poland, the United Kingdom, Serbia and Montenegro, the Slovak Republic, Sweden, Switzerland).

29. However, restrictions or conditions may be imposed on a member of parliament who practises as a lawyer, based on the requirements of independence, professional ethics and availability. Thus, despite the absence of a legislative prohibition in this regard, the German Federal Court of Justice stated in a judgment of 26 June 1978 that the timetable of *Bundestag* sittings enabled a member of parliament to practise as a lawyer, subject to the prohibitions concerning conflicts of interest set out in the Lawyers Act and the legal profession's Code of Ethics.

30. This specific concept of conflict of interest exists in several countries' legislative provisions. Thus, in France, Article 149 of the Electoral Code prohibits any lawyer registered with the Bar who is a member of parliament from carrying out, directly or indirectly through an associate or colleague (except before the *Haute Cour de justice* or the Court of Justice of the Republic), any professional act in criminal cases concerning certain crimes or offences against the State or the areas of finance or the press, or to plead in civil proceedings for companies which receive State grants, financial companies or companies which use savings, companies engaged in civil engineering, construction or property development, or against the State, State-owned companies, local authorities or public establishments.

31. Similar provisions exist in the legislation of other civil-law countries, such as Italy (section 10 of the Elections Act), Portugal (section 21 of the Statute of Members of the Assembly of the Republic), Romania (section 82 of the Exercise of Public Duties (Transparency Measures) Act (Law no. 161/2003), Title IV on members of parliament, as amended by the Status of Lawyers Act) and Turkey (section 3 of the Disqualifications of members of the Grand National Assembly Act 1984 (Law no. 3069)).

32. In the common-law countries, the codes of ethics of members of parliament guarantee parliamentarians' independence *vis-à-vis* possible conflicts of interest by means of administrative and procedural measures. In the United Kingdom, members of parliament must declare any work or paid employment and have this declaration entered in the register of members' interests. Failure to register an interest may result in sanctions (Code of Conduct for Members of Parliament and Guide to the Rules relating to the Conduct of Members of Parliament). Similar provisions exist in Ireland (sections 5, 6 and 7 of the Ethics in Public Office Act 1995) and in Malta (Article 5 of the 1995 Code of Ethics of Members of the House of Representatives).

33. Those procedures for declaring and registering the assets and financial interests of members of parliament have also been adopted in some

countries of continental Europe. Thus, the Rules of the Italian Chamber of Deputies provide for a similar system to determine cases of incompatibility: within thirty days of the Chamber's first sitting, each member must submit a declaration to the speaker concerning the functions occupied by him or her at the time of standing for election, and those commercial or professional activities which he or she continues to carry out. In Switzerland, members of parliament are also obliged to notify their financial interests and any other professional activity carried out by them when they take up their duties (section 11 of the 2002 Federal Assembly Act).

34. Other more practical limitations and restrictions have been added to those cited above, which are based on the concept of independence and conflict of interest. Various regulations on the status of members of parliament require that they give their parliamentary activities priority over any other private work, whether remunerated or not. In Finland, Parliament may, by a two-thirds majority, require that a member of parliament forfeit his or her seat, permanently or for a specific period, if the individual concerned neglects his or her duties in a significant and repeated manner. In practice, this obligation is reflected in a significant reduction in the time spent working in other professions, or withdrawal from them (as in Sweden).

35. In Spain, the requirement to carry out parliamentary duties on a full-time basis results in very restrictive rules on disqualification (section 157 of the 1985 implementing Law on the general electoral system); holding a parliamentary seat is incompatible with the direct or indirect exercise of any private or public profession or activity, remunerated by way of wages, salaries, dues, fees or other means (an exception is made for university lecturers). However, section 159(3) of the 1985 implementing Law permits interested parties to apply to the relevant chamber's disqualification committee for leave to conduct private activities which do not concern public bodies or services, public companies, companies which are financed from public funds or credit or insurance companies.

36. Parliamentary committees exist in several countries. They may authorise professional activity, including in the public sector, which would otherwise be considered incompatible with the holding of a parliamentary seat (see section 6a(1) and (2) of the Austrian Disqualification Act). In certain cases, those activities must be carried out without remuneration.

37. A blanket prohibition on exercising any profession, trade or remunerated form of employment, similar to that laid down in the Greek or Spanish legislation, also exists in a more or less rigid form in other countries, especially those of central and eastern Europe, such as Lithuania (Article 6 of the Constitution), "the former Yugoslav Republic of Macedonia" (section 9 of the Status of Members of Parliament Act), the Russian Federation (Article 97 of the Constitution) and Moldova (Article 70

of the Constitution). As in Spain, however, exceptions exist for teaching, scientific research and creative activities.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL No. 1

38. The applicant complained that his disqualification from his parliamentary seat, ordered by the Special Supreme Court under the new Article 57 of the Constitution, had infringed his right to be elected to the national parliament and had deprived his constituents of the candidate they had elected before his term of office had expired. He relied on Article 3 of Protocol No. 1, which provides:

> "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. The parties' submissions

1. The applicant

39. The applicant emphasised, firstly, that the instant case did not concern a conflict between the Greek Constitution as such and the Convention, but rather the way in which the Special Supreme Court had interpreted and applied the new Article 57 of the Constitution in his case. In particular, he complained that the impugned disqualification had been interpreted by the Special Supreme Court in the widest possible manner, thus disregarding the intentions of the constitutional revision body and of the ordinary legislature, which had clearly ruled, in both 2001 and 2003, in favour of a non-absolute professional disqualification. In this connection, the applicant noted that in February 2003 the draft implementing Law for the new Article 57 – a bill which provided for an absolute professional disqualification – had been dismissed by the Chamber of Deputies. He submitted that this was an unprecedented event in Greece's parliamentary annals, particularly since the ruling party then enjoyed an absolute majority in Parliament. The applicant considered that, given that the Chamber which threw out this bill was the same as that which, two years previously, had enacted the new Article 57, the real intent behind that Article had thus been the adoption of a partial professional disqualification, the exact limits of which were to be established by the ordinary legislature.

40. The applicant pointed out that he disputed neither the wisdom nor the appropriateness of parliamentary disqualifications in general. In this regard, he acknowledged that the rule by which a State employee, a civil servant or the manager of a public company could not simultaneously be a member of the national parliament was based on the principle of the separation of powers, in other words, on the very foundation of the parliamentary system; in contrast, the extension of that rule to an individual having no link with the State, such as, for example, a lawyer, doctor or engineer, could not, in his opinion, be justified by the same principle.

41. The applicant further acknowledged that, in a democracy, the representatives of the people must be independent of "hidden" powers, economic or otherwise; in addition, they must be free of any financial constraints and able to devote themselves fully to carrying out their parliamentary duties. No one could seriously contest this two-fold aim, the pursuit of which undoubtedly fell within the Contracting States' margin of appreciation. However, he considered that the means used to achieve that aim had exceeded the level of what was tolerable in a democratic society. An absolute professional disqualification, which had no parallel in the signatory States of the Convention, or even throughout the world, was not, in the applicant's opinion, merely a limitation on the right to be elected as a member of parliament; he believed it was so dissuasive that it would result, purely and simply, in a large category of citizens being prevented from exercising that right.

42. According to the applicant, this prohibition was all the more unacceptable in that the aim pursued by the new Article 57 could be achieved by methods which were much less restrictive: as demonstrated by the legislative and constitutional practice of other States, the independence of members of parliament *vis-à-vis* economic interests could be guaranteed by methods that were more rational and, in particular, more proportional, such as the obligation imposed in the United Kingdom on any member of parliament who was a lawyer or doctor to enter his clients officially in the parliamentary register, or the non-absolute professional disqualifications laid down for members of the French National Assembly and Senate. As far as the applicant was aware, in those and other States where the legal system provided for similar forms of parliamentary disqualification, there were no absolute prohibitions which were comparable, by their nature or scope, with those which the new Article 57 of the Constitution had introduced in Greece.

43. In addition, referring to the adoption procedure for the professional disqualification, the applicant claimed that it had not been the result of an in-depth debate, but a sudden and ill-prepared initiative which had caught the Chamber examining the revision and its members, whatever their political sympathies, unawares. He argued that a simple reading of the official records showed that the disqualification in question had been

proposed by the then government for the first time in January 2001, to general surprise. During the brief debate which had preceded its enactment, many voices had been raised against it. It was therefore clear that, at the time of his election for a four-year term of office, neither the applicant nor his constituents had been able to foresee that he would lose his seat before the end of the parliamentary term for which he stood. In deciding that the disqualification in question also concerned members of parliament who had been elected before its enactment, the Special Supreme Court had thus breached the principle of legitimate expectation with regard not only to the applicant, but also those who had freely voted for him.

2. The Government

44. The Government referred to the case-law of the Convention organs, pointing out that Article 3 of Protocol No. 1 implied substantive rights: the right to vote and to stand for election. Important as those rights were, they were not, however, absolute. Since Article 3 of Protocol No. 1 recognised them without setting them forth in express terms, let alone defining them, there was room for "implied limitations". The Government also stressed that the States enjoyed considerable latitude to establish in their constitutional order rules governing the status of parliamentarians, including criteria for disqualification.

45. With regard to the facts of the present case, the Government confirmed that the rule on professional disqualification was introduced when the Constitution was revised in April 2001 and enshrined in the new Article 57 of the Constitution; however, they pointed out that it had been put before the then Chamber of Deputies from January 1998 onwards. They added that, under Article 115 § 7 of the Constitution, the disqualification was to take effect on 1 January 2003 at the latest. In the Government's opinion, there was therefore no doubt that it also applied to the members of parliament in office on that date, even if the implementing Act for the new Article 57 of the Constitution had not yet been enacted. The applicant, an eminent lawyer, was in a position to know that pursuing his professional activities after 1 January 2003, even without remuneration, would result in forfeiture of his parliamentary seat.

46. In the Government's opinion, the main aim of the professional disqualification in question was to enable members of parliament to devote themselves completely to the exercise of their parliamentary duties, without carrying out other activities. Further, the authority and independence of members of parliament was strengthened by this measure, and they were now protected from any pressure that might be exerted by their private clients. In this connection, the Government emphasised that the risk of unlawful influence on a member of parliament through his or her professional activities increased where the parliamentarian concerned was not paid for that work, since the client-constituent would feel obliged to

thank the member of parliament by voting for him or her in subsequent elections. Finally, given the social prestige enjoyed by members of parliament, the introduction of this disqualification was also intended to protect other professionals, who were not members of parliament, from unfair competition on the part of those of their peers who were.

47. The Government also alleged that the fact that the legislature had wished to extend this disqualification to members of parliament elected prior to the constitutional revision was neither surprising nor arbitrary, bearing in mind the risk of unlawful influence on constituents with a view to future elections and the immediate need to strengthen the authority and independence of the members of parliament in office. The Government added that between the constitutional revision in April 2001, introducing the disqualification, and the latter's entry into force in January 2003, members of parliament had had approximately twenty-one months to assess the situation and to choose between their profession and their duties as members of parliament.

48. Finally, the Government referred in detail to the remuneration of members of parliament and claimed that the legislature had taken action to ensure that they could carry out their duties in optimal financial conditions and receive numerous pension-related privileges on expiry of their term of office; they considered that the professional disqualification did not therefore prevent citizens from standing in parliamentary elections, whatever their financial situation. As proof, the Government noted that, with the exception of the applicant and one other member of parliament, the other members of the 2000-04 legislature chose to exercise their duties as members of parliament and that the implementation of the disqualification did not prevent citizens from standing for election in the parliamentary elections of March 2004. In this connection, the Government stressed that the law could not take account of each individual case but had to establish a general norm.

49. The Government concluded that the professional disqualification introduced by the new Article 57 of the Constitution and the manner in which it had been interpreted by the Special Supreme Court in the instant case had not infringed the rights guaranteed by Article 3 of Protocol No. 1.

B. The Court's assessment

50. Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and its Protocols, as it is phrased in terms of the obligation for the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom. However, having regard to the preparatory work to Article 3 of Protocol No. 1and the interpretation of the provision in the context of the Convention as a whole, the Court has

established that it guarantees individual rights, including the right to vote and to stand for election (see, among many other authorities, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, §§ 46-51, Series A no. 113; *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 56-57, ECHR 2005-IX; and, more recently, *Ždanoka v. Latvia* [GC], no. 58278/00, § 102, ECHR 2006-IV). Furthermore, the Court has considered that this Article guarantees the individual's right to stand for election and, once elected, to sit as a member of parliament (see *Sadak and Others v. Turkey (no. 2)*, nos. 25144/94, 26149/95 to 26154/95, 27100/95 and 27101/95, § 33, ECHR 2002-IV).

51. 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. Nonetheless, those rights are not absolute. There is room for "implied limitations", and Contracting States must be given a margin of appreciation in this sphere. The Court would reaffirm that the margin in this area is wide (see *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV; and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II). There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision (see *Hirst (no. 2)*, cited above, § 61).

52. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions imposed in the right to vote and to stand for election do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, cited above, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage (see *Hirst (no. 2)*, cited above, § 62). Equally, once the wishes of the people have been freely and democratically expressed, no subsequent amendment to the organisation of the electoral system may call that choice into question, except in the presence of compelling grounds for the democratic order.

53. In the instant case, the applicant has invited the Court to censure the absolute nature of the disqualification in question, and especially the wide interpretation given to it by the Special Supreme Court in the absence of the implementing legislation envisaged by the Constitution. Nevertheless, however interesting those aspects of this case may be, it is not the Court's

task to state its view on the general prohibition on practising any profession; it confines itself to observing that this blanket prohibition, created by the new Article 57 of the Constitution, introduces a disqualification that is rarely encountered in other European States (see paragraphs 21-37 above).

54. That said, the Court cannot overlook the fact that the applicant was elected in conditions which were not open to criticism, that is, in accordance with the electoral system and Constitution as in force at the material time. Neither the applicant, as candidate, nor his electors could have imagined that the former's election would be called into question and held to be flawed while his term of office was still in progress on account of a disqualification arising from the parallel exercise of a professional activity.

55. The Court is not persuaded by the Government's argument that the impugned disqualification had been announced well before the elections of 9 April 2000. The opinion of the three opposition members of parliament who expressed their support for absolute disqualification in January 1998 does not, in the Court's opinion, suffice to conclude that the candidates for the elections of 9 April 2000 and the electorate were aware of it. In any event, neither the parliamentary commission's report of 30 March 1998 nor, even less, that of 23 October 2000 referred to the introduction of an absolute professional disqualification (see paragraph 18 above). In the final analysis, the Court considers that the disqualification in question came as a surprise both to the applicant and to his electors during the said term of office.

56. On this point, the Court reaffirms that the object and purpose of the Convention requires its provisions to be interpreted and applied in such a way as to make their stipulations not just theoretical or illusory but practical and effective (see, for example, *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37; *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 33, *Reports of Judgments and Decisions* 1998-I; and *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 100, ECHR 1999-III). The rights guaranteed by Article 3 of Protocol No. 1, rights which are inherent in the concept of a truly democratic system, would be illusory if the applicant or his electors could be arbitrarily deprived of them at any moment (see, *mutatis mutandis*, *Melnychenko v. Ukraine*, no. 17707/02, § 59, ECHR 2004-X).

57. In those circumstances, the Court concludes that, by considering the applicant's election under the new Article 57 of the Constitution without taking into account that he had been elected in 2000 in full accordance with the law, the Special Supreme Court had caused him to forfeit his seat and had deprived his constituents of the candidate whom they had chosen freely and democratically to represent them for four years in Parliament, in breach of the principle of legitimate expectation. In this connection, the Court notes that the Government have not advanced any ground of pressing significance to the democratic order that could have justified the immediate application

of the absolute disqualification. This situation is therefore in breach of the very substance of the rights guaranteed by Article 3 of Protocol No. 1.

58. Consequently, there has been a violation of this provision.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

59. The applicant pointed out that he had been a lawyer since the age of twenty-six and that he had been elected to Parliament for the first time at the age of sixty-six, when he was at the height of his career. Politics was thus a complement to a successful career; it was not the centre of his life and did not mark the end of his career as a lawyer. However, obliged as he was to withdraw from his parliamentary duties in order to be able to pursue his professional activities – a particularly apt field for the development of any individual's personality, talents and skills – he had been subjected to an unjustified interference in his private and professional life. He relied on Article 8 of the Convention, which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

60. The Court points out that, in its decision on the admissibility of the application, it joined to the merits the Government's objections as to the applicability of Article 8 of the Convention and the applicant's victim status in the context of the complaint under that provision. However, having regard to the finding of a violation of Article 3 of Protocol No. 1, the Court does not consider it necessary to examine the case under Article 8 as well. This conclusion renders it unnecessary for the Court to rule separately on the preliminary objections raised by the Government.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

61. 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

62. By way of just satisfaction, the applicant claimed the parliamentary allowances to which he would have been entitled had he not been obliged to forfeit his parliamentary seat, namely a total of 51,148.78 euros (EUR).

63. The Government accepted that, had the applicant not been forced to forfeit his parliamentary seat, he would have received the amount claimed. Nonetheless, they noted that the applicant had been able to resume freely his work as a lawyer on a full-time basis and thus to compensate the loss of his parliamentary allowances by the fees that he had been able to earn. In this connection, the Government emphasised that the applicant was a well-known lawyer with a large and prosperous clientele.

64. The Court notes that it was not disputed that, had the applicant not been forced to forfeit his parliamentary seat, he would have received, between the date of the impugned measure and the end of the legislature to which he had been elected, the amount claimed. However, the Court also notes that the applicant did not remain inactive during this period; on the contrary, he was able to resume his professional activities and to receive the resultant fees. In addition, the applicant has not shown that the total of the fees in question was less than that of the parliamentary allowances that he did indeed lose during the period in question (see, *mutatis mutandis*, *Thlimmenos v. Greece* [GC], no. 34369/97, § 67, ECHR 2000-IV). Having regard to the inherent uncertainty in any attempt to estimate the real losses sustained by the applicant and making its assessment on an equitable basis, the Court decides to award him EUR 20,000 under this head, plus any tax that may be chargeable.

B. Costs and expenses

65. The applicant claimed EUR 20,000 in respect of the costs and expenses incurred before the domestic courts and the Court. In this connection, he submitted two bills drawn up by his lawyer, for a total amount of EUR 14,000.

66. The Government claimed that the amount awarded to the applicant under this head should not exceed EUR 10,000.

67. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI).

68. In the instant case, having regard to the evidence before it and the above-mentioned criteria, the Court considers it reasonable to award the applicant EUR 14,000 for costs and expenses, plus any tax that may be chargeable.

C. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 3 of Protocol No. 1;

2. *Holds* by five votes to two that it is not necessary to rule separately under Article 8 of the Convention;

3. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20,000 (twenty thousand euros) in respect of pecuniary damage and EUR 14,000 (fourteen thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in French, and notified in writing on 15 June 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Loukis Loucaides
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly concurring opinion of Judge Loucaides;
(b) partly dissenting opinion of Judge Spielmann joined by Judge Tulkens.

L.L.
S.N.

PARTLY CONCURRING OPINION OF JUDGE LOUCAIDES

I fully endorse the conclusion of the majority in this case and the reason given for it. However I would like to add additional reasons in support of the finding of a violation of Article 3 of Protocol No. 1.

The judgment of the Special Supreme Court terminating the applicant's term of office as an elected member of parliament frustrated the wish of the people to be represented by the applicant, contrary to the requirements of democracy and the legitimate expectations of the voters and the applicant and, therefore, to the rights guaranteed by Article 3 of Protocol No. 1. I would also add that the judgment in question did not have sufficient legal basis. It was supposed to be an application of Article 57 of the Constitution, but such an application was evidently wrong because it is clear from the relevant provisions of that Article that it was only intended to be applied to parliamentarians elected after it came into force, not to those who had already been elected. Therefore, it was not applicable to parliamentarians like the applicant, who had been elected a year before the introduction of that provision. This is apparent from the fact that the Article prescribes a period of *eight days after the election* for the parliamentarians concerned to opt between their parliamentary mandate and their professional activities as follows:

> "The representatives affected by the first sentence of the preceding paragraph must *within eight days from the date on which their election has become definite* choose by means of a declaration between the parliamentary mandate and their professional activities mentioned above. If they omit to deposit this declaration within the prescribed time they will be stripped automatically of their functions as members of parliament." (emphasis added)

Furthermore, I find that the absolute nature of the incompatibility rule contained in this Article amounts to a restriction of the rights safeguarded by Article 3 of Protocol No. 1 which is disproportionate to the legitimate aim pursued and therefore not necessary in a democratic society. In this respect, I have taken the following factors into account.

The principal aim pursued by the rule was, according to the Government, to enable members of parliament to concentrate entirely on their parliamentary functions without engaging in other activities. Furthermore, according to the Government, the rule would reinforce the authority and independence of parliamentarians and protect them from any pressure that may emanate from their private clients. However, there does not appear to have been any serious study of the advantages and disadvantages of such an absolute restriction before the rule was introduced; in particular, there has been no consideration of whether the aim pursued could have been achieved by a more qualified and less restrictive rule rather than the absolute one that was adopted. In this respect, it is important to underline that, according to the relevant constitutional provision which introduced the rule, legislation

was to be brought in to specify the activities that could be considered compatible with parliamentary office. This legislation has, however, never been enacted and so this matter has been left in abeyance and undecided, although the legislature had already manifested through the provision in question an intention to qualify the rule on incompatibility.

I agree with the applicant that the absolute nature of the rule has a deterrent effect on a large section of the population, especially, in my opinion, those who are successful professionally – who are presumably competent and efficient people – when it comes to standing for election, and so deprives voters of the possibility of being represented by such people. The result is that there has been an interference with the rights safeguarded by Article 3 of Protocol No. 1. I also find quite pertinent the argument that in other States, such as the United Kingdom and France, a similar objective to the one pursued by the rule in question has been attained by far less restrictive means.

Making parliamentarians dependent for their living exclusively on the compensation they receive in that capacity would, I think, affect their independence and make them vulnerable to undue or improper pressure or influence from voters. It would also transform them into lifelong professional parliamentarians forced to seek the renewal of their mandate by all means in order to earn a living.

In the circumstances, I find that the lack of a sufficient legal basis and the absolute nature of the incompatibility rule adopted and applied in this case are additional reasons for finding a violation of Article 3 of Protocol No. 1.

PARTLY DISSENTING OPINION OF JUDGE SPIELMANN JOINED BY JUDGE TULKENS

(Translation)

1. It is recalled that the applicant alleged that, on account of the fact that he had been obliged to withdraw from his parliamentary duties in order to be able to continue his professional activity – a particularly apt field for the development of any individual's personality, talents and skills – he had been subjected to an unjustified interference in his private life which extended to his professional life. In addition, he claimed that, from the date on which the rule on disqualification in question came into force, his income as a lawyer had simply ceased, and accordingly he had suffered heavily from the application of the new Article 57 of the Constitution. The applicant consequently concluded that Article 8 of the Convention was applicable and had been violated.

2. In its decision on the admissibility of the application, the Court joined to the merits the Government's objections concerning the applicability of Article 8 and the applicant's victim status in the context of the complaint under that provision. However, "having regard to the finding of a violation of Article 3 of Protocol No. 1, the Court does not consider it necessary to examine the case under Article 8 as well" (see paragraph 60 of the judgment).

Nonetheless, I think that this complaint would have merited separate examination, particularly in view of the Court's recent case-law, which has recognised the right to a private professional life.

3. In its judgment in *Sidabras and Džiautas v. Lithuania* of 27 June 2004, the Court held:

> "... having regard in particular to the notions currently prevailing in democratic States, the Court considers that a far-reaching ban on taking up private sector employment does affect 'private life'. It attaches particular weight in this respect to the text of Article 1 § 2 of the European Social Charter and the interpretation given by the European Committee of Social Rights ... and to the texts adopted by the ILO ... It further reiterates that there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention (see *Airey v. Ireland,* judgment of 9 October 1979, Series A no. 32, pp. 14-16, § 26)."[1]

In its judgment in *Campagnano v. Italy* of 23 March 2006, the Court confirmed this case-law:

> "...the notion of 'private life' does not exclude in principle activities of a professional or business nature. It is, after all, in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A

1. *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 47, ECHR 2004-VIII.

> no. 251-B). Finally, the Court refers to its recent finding that a far-reaching ban on taking up private-sector employment did affect 'private life' (see *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 47, ECHR 2004-VIII), particularly in view of Article 1 § 2 of the European Social Charter, which came into force in respect of Italy on 1 September 1999, and which states '[w]ith a view to ensuring the effective exercise of the right to work, the Parties undertake ... to protect effectively the right of the worker to earn his living in an occupation freely entered upon'."[1]

It is particularly revealing that the Court, in this judgment concerning limitations on a bankrupt's voting rights, found a dual violation of Article 3 of Protocol No. 1 *and* of Article 8 of the Convention.

Finally, in its decision in *Mółka v. Poland* of 11 April 2006, the Court summarised its interpretation of the concept of "private life" in the following way:

> "As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *X and Y v. the Netherlands*, [26 March 1985, § 22, Series A no. 91]). It can sometimes embrace aspects of an individual's physical and social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I). Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature. There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life' (see, *inter alia*, *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003-I)."[2]

4. In the instant case, the applicant emphasised the fact that he had been a lawyer since the age of twenty-six and that he had been elected to parliament for the first time at the age of sixty-six, when he was at the height of his career. He informed us that, in his case, politics was therefore a complement to a successful career; it was not the centre of his life and did not mark the end of his career as a lawyer. However, having been obliged to withdraw from his parliamentary duties in order to be able to pursue his professional activities, he had, in his view, suffered an unjustified interference in his private and professional life (see paragraph 59 of the judgment).

In the light of the Court's case-law, this complaint merited separate and detailed examination. The interference in question undoubtedly affected the applicant's ability to practise his profession as a lawyer and therefore to earn his living, which had obvious repercussions on his private life (see, *mutatis mutandis*, *Sidabras and Džiautas*, cited above, § 48). As a recent scholarly article, referring in particular to the above-mentioned *Sidabras and Džiautas* judgment, has pointed out: "Thus, the seriousness of the

1. *Campagnano v. Italy*, no. 77955/01, § 53, ECHR 2006-IV.
2. *Mółka v. Poland* (dec.), no. 56550/00, ECHR 2006-IV.

difficulties in *earning one's living through employment* is the principal factor in recognition of the right to private professional life."[1]

1. J.-P. Marguénaud and J. Mouly, "Le droit de gagner sa vie par le travail devant la Cour européenne des droits de l'homme", *Recueil Dalloz*, 16 February 2006, pp. 477 et seq., esp. p. 478.