



## Ending an MP's mandate prematurely was unlawful and disproportionate, and placed political parties above the electorate

In today's Chamber judgment<sup>1</sup> in the case of [Tomenko v. Ukraine](#) (application no. 79340/16) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 3 of Protocol No. 1** (right to free elections) to the European Convention on Human Rights.

The case concerned the early ending of Mr Tomenko's term as a member of parliament (MP) in 2016 for having left the political faction in which he had been elected. It was ended by his party, Solidarity (the Bloc of Petro Poroshenko), and appeared to be the first time a party had terminated an MP's mandate for that reason.

The Court considered that Mr Tomenko could hardly have foreseen that his withdrawal from the parliamentary faction would lead to early termination of his term of office as an MP. The constitutional provisions providing for early termination of an MP's mandate for that reason had never before been applied in practice. Moreover, only two out of the ten MPs who had been elected from the party's list and who had since withdrawn from its parliamentary faction had their terms of office truncated.

Furthermore, there had been no legal framework, let alone an adequate one, to protect Mr Tomenko's passive electoral right against abuse. The Court found that the situation where a political party had complete freedom to choose to put an end to an MP's mandate for having left its parliamentary faction, with no explanations to give and no procedures to follow, could only be interpreted as effectively removing such decisions from the remit of the law. The Court found that that was incompatible with the rule of law.

### Principal facts

The applicant, Mykola Volodymyrovych Tomenko, is a Ukrainian national who was born in 1964 and lives in Kyiv. He was elected as a member of the Ukrainian Parliament, the Verkhovna Rada, in 2002, 2006, 2007, 2012 and 2014.

In the early parliamentary elections in October 2014, Mr Tomenko stood as a candidate and was elected from the list presented by the then President's party, the Petro Poroshenko Bloc "Solidarity". He became the deputy head of the party's parliamentary faction, one of the factions forming the coalition government. However, on 25 December 2015, he withdrew from the faction, disagreeing with its "anti-humanitarian" and "anti-social" approach to the 2016 State budget.

Three months later, the party amended its charter and enabled its congress to truncate an MP's term of office, by way of an "imperative mandate" provision in the Constitution in which MPs were bound to remain members of the parliamentary faction or bloc in which they had been elected. It immediately terminated Mr Tomenko's term and that of another parliamentarian for having left the

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution).

parliamentary faction, and replaced them immediately with two other candidates. Their MP salary and allowances were stopped.

Although there had been numerous withdrawals from various parliamentary factions in the past, it appeared that this was the first time that an MP's mandate had been terminated early by a political party. Also, although ten MPs had withdrawn from Solidarity during the course of 2015 and 2016, eight of them had continued to sit in the Parliament either as independents or having joined a different faction or group. That was again true for a further eight MPs who withdrew from Solidarity on various dates after March 2016.

On 13 May 2016 Mr Tomenko lodged a claim with the Higher Administrative Court alleging that the early termination of his mandate as MP was unlawful, as the constitutional provisions in question provided for that possibility only on the basis of a law determining the relevant conditions and procedures. As no such law had ever been passed, he contended that his mandate had been terminated in the absence of a legally established procedure.

On 28 July 2016 the Higher Administrative Court found against Mr Tomenko, holding that the early termination of his term of office as an MP complied with Article 81 §§ 2 (6) and 6 of the Constitution, provisions which were both applicable and self-sufficient.

## Complaints, procedure and composition of the Court

Relying on Articles 8 (right to respect for private and family life), 10 (freedom of expression) and 13 (right to an effective remedy), and Article 3 of Protocol No. 1 (right to free elections), Mr Tomenko complained, in particular, of the early termination of his mandate of MP.

The application was lodged with the European Court of Human Rights on 13 December 2016.

Judgment was given by a Chamber of seven judges, composed as follows:

Kateřina Šimáčková (the Czech Republic), *President*,  
María Elósegui (Spain),  
Georgios A. Serghides (Cyprus),  
Gilberto Felici (San Marino),  
Diana Sârcu (the Republic of Moldova),  
Mykola Gnatovskyy (Ukraine),  
Vahe Grigoryan (Armenia),

and also Victor Soloveytchik, *Section Registrar*.

## Decision of the Court

### Article 3 of Protocol No. 1

The Court examined the complaint solely under the aspect of Article 3 of Protocol No. 1 – the right to free elections.

Noting that there was no legal framework indicating the breadth of discretion that political parties had under the constitutional provisions in question and the way they should be implemented, the Court noted in addition that there were no rules on the procedures to be followed and no safeguards against abuse. It also observed that the text of the oath to be pledged by MPs before taking up office stated that they were to represent the Ukrainian people and to carry out their duties in the interests of all compatriots. In the case [Paunović and Milivojević v. Serbia](#), concerning the “imperative mandate” in Serbia, the Court had explicitly upheld the position of the Serbian Constitutional Court, according to which “MPs held a mandate from the people, not from their party”. The same principle was to be

found in the Status of MPs Act in Ukraine. The list of grounds for early termination of an MP's term of office under section 4 of that Act did not include failing to join a parliamentary faction or withdrawing from one.

Despite numerous previous instances of MPs withdrawing from the parliamentary faction in which they had been elected, the constitutional provisions providing for early termination of an MP's mandate for that reason had never before been applied in practice. Moreover, in this particular case, only two out of the ten MPs who had been elected from the party's list and who had withdrawn from its parliamentary faction had had their terms of office truncated. In the circumstances, the Court considered that Mr Tomenko could not have foreseen that his withdrawal from the parliamentary faction Solidarity would lead to early termination of his mandate as an MP.

Moreover, there had been no legal framework, let alone an adequate one, to ensure effective protection of his passive electoral right against abuse. The situation where a political party enjoyed complete freedom to choose to put an end to the mandate of an MP who had left its parliamentary faction, with no explanations to give and no procedures to follow, could only be interpreted as effectively removing such decisions from the remit of the law. As such, it was incompatible with the rule of law.

The Court also took note of the position consistently expressed by the [Venice Commission](#) and shared by the [Parliamentary Assembly of the Council of Europe](#) (PACE) and the [OSCE Office for Democratic Institutions and Human Rights](#) (OSCE/ODIHR), that the imperative mandate or similar practices were contrary to the principle of a free and independent mandate, which formed part of the European constitutional tradition.

The Court had no doubt that strengthening party discipline and preventing the fragmentation of parliamentary blocs was important for ensuring effective functioning of Parliament. It shared the Venice Commission's conclusion that, where cross-party defections were common, it was legitimate to introduce countermeasures preventing the "sale" of mandates or votes. However, it would be unacceptable, under the pretext of such countermeasures, to place political parties above the electorate and to give them the power to annul electoral results, as had been the case here.

In sum, the Court considered that the ending of Mr Tomenko's term of office prematurely in this case was not only unlawful but also clearly disproportionate and thwarted the free expression of the people in the choice of the legislature. There had therefore been a violation of Article 3 of Protocol No. 1.

### [Just satisfaction \(Article 41\)](#)

The Court held that Ukraine was to pay the applicant 3,000 euros (EUR) in respect of non-pecuniary damage and EUR 500 in respect of costs and expenses.

*The judgment is available only in English.*

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