

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

FIFTH SECTION

CASE OF TORBICH v. UKRAINE

(Applications nos. 41713/13 and 29980/15)

JUDGMENT

STRASBOURG

28 March 2024

This judgment is final but it may be subject to editorial revision.



In the case of Torbich v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Committee composed of:

Carlo Ranzoni*, President*,
Mattias Guyomar,
Mykola Gnatovskyy*, judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the applications against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the applicants listed in the appended table ("the applicants"), on the various dates indicated therein;

the decision to give notice of the applications to the Ukrainian Government ("the Government") represented, by their Agent, most recently Ms M. Sokorenko;

the parties' observations;

Having deliberated in private on 28 September 2023, 16 November 2023 and 7 March 2024,

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

SUBJECT MATTER OF THE CASE

1. The case concerns a refusal to provide journalists with information held by State authorities, allegedly in violation of Article 10 of the Convention. The second applicant also complained under Article 6 § 1 of the Convention about the length of the proceedings he had initiated to contest that refusal.

2. At the time of the relevant events, the second applicant, Mr Torbich, was the editor-in-chief of the analytical and informational internet portal Chetverta Vlada ("The Fourth Estate") and Ms Torbich, the first applicant, was his deputy. Both applicants lived in the town of Rivne.

3. By law, as part of the registration process for standing in elections to Parliament, all candidates must submit to the Central Election Commission ("the CEC") their biographical statements (hereafter "CV"), together with a photograph. Brief biographical information about the candidates (as defined by law, and for the publication of which the candidates have also given their consent), taken from the CVs provided, is then published on the CEC's website. The CEC also disseminates the candidates' campaign posters with their photographs and biographical information.

4. Between August and September 2012, in the context of the parliamentary elections of that year, the applicants, presenting themselves as journalists, asked the CEC to provide them with the CVs and photographs of all single-mandate constituency candidates registered in the Rivne Region. The applicants' requests stated that the relevant information was "open"

according to the legislation, namely the Law on Information and the Law on Access to Public Information. The first applicant also noted in her request that the information was needed by voters in general to make an informed choice during the elections. The second applicant's request stated that he as an individual voter was requesting the information in order to make an informed choice.

5. In its replies to the requests dated 28 August and 26 September 2012 respectively, the CEC refused to provide the CVs on the grounds that they contained not only open information but also confidential personal information, namely the candidates' addresses, telephone numbers and family composition. It added that the photographs could not be disseminated without the candidates' consent. In its reply to the second applicant, the CEC also noted that when producing campaign posters, candidates were not required to use the same photograph that had been submitted to the CEC and that it did not control what biographical information was put on the posters.

6. The applicants challenged those refusals before the courts in two separate sets of proceedings. The second applicant lodged a claim with the Kyiv Circuit Administrative Court on 16 October 2012. That court initially refused to open proceedings on grounds of lack of jurisdiction, as complaints against the actions or decisions of the CEC fell to be examined by the Kyiv Administrative Court of Appeal sitting as a first-instance court. In that connection the Kyiv Circuit Administrative Court referred to Article 172 of the Code of Administrative Procedure, which sets out the peculiarities of the examination of complaints against the actions and decisions of election commissions, including the rules of jurisdiction and the application of shortened deadlines. On 19 December 2012, following an appeal by the second applicant, the High Administrative Court found that the second applicant's case was not an election-related dispute as the second applicant could not be considered a "subject of election process" and therefore the special rules prescribed by Article 172 did not apply. On that basis, on 14 January 2013 the Kyiv Circuit Administrative Court eventually opened the proceedings and started its examination on the merits.

7. Before the domestic courts, the applicants, emphasising their role as journalists, argued that even if certain information contained in the CVs might have been considered confidential, the CEC should still have provided them with the information classified as open. Given the CEC's lack of control over the information included by the candidates on their posters, it was even more important to have access to their original CVs and photographs. The applicants argued that the information requested was important, as during elections there were often "technical candidates" or "doppelgangers" who had the same, or very similar, names, and by using this technique, political opponents sought to disperse the votes. In view of the above, access to the documents requested was important to inform the public.

8. The applicants' claims were rejected by the courts, which essentially endorsed the reasons given by the CEC, noting that the legislation provided that certain types of information about candidates were public and had to be disseminated by the CEC and that all other information was confidential. In that context the courts referred to the Law on Elections of People's Deputies ("the Law on Elections") and to the decisions of the Constitutional Court of Ukraine of 1997 and 2012 which had essentially characterised all information about private and family life as confidential.

9. The first applicant's case was examined in abridged proceedings and the final judgment was adopted by the Zhytomyr Administrative Court of Appeal on 17 December 2012. The final judgment in the second applicant's case, examined by way of the standard procedure, was given by the High Administrative Court on 9 December 2014.

10. The elections took place on 28 October 2012.

THE COURT'S ASSESSMENT

I. JOINDER OF THE APPLICATIONS

11. 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 10 OF THE CONVENTION

A. Admissibility

1. Exhaustion of domestic remedies (application no. 41713/13)

12. The Government argued that the first applicant had failed to exhaust domestic remedies as she had not lodged a cassation appeal against the appellate court's decision although the possibility of doing so had been indicated to her in the decision itself.

13. The first applicant disagreed, stating that no cassation appeal was available under the legislation governing abridged proceedings.

14. The Court observes that the domestic legislation did not provide for the possibility of a cassation appeal in cases examined in abridged proceedings (see *Kushnir v. Ukraine* [Committee], no. 8531/13, §§ 20 and 28, 28 January 2021). Even though the appellate court did mention the possibility of further appeal in its judgment, the Court is not convinced that that possibility was indeed open to the applicant, and the Government failed to provide any examples or other arguments to the contrary. The Court thus dismisses this preliminary objection.

2. Applicability of Article 10

15. The Government further contended that there had been no interference with the applicants' right of freedom of expression. While the applicants were journalists and represented an organisation which could be considered a "watchdog", the information requested could not be said to have been necessary for the exercise of their freedom of expression in the circumstances of the present case. In particular, it touched upon the private life of people who were merely candidates for elected positions and not yet members of parliament. Moreover, the information which was necessary to enable voters to make their choice had been made public by the CEC as required by the law. They further emphasised the divergent explanations by the applicants of the purpose of their requests and noted that, as transpired from the lists of registered candidates, there were no "doppelgangers", so no one could have been misled by the candidates' names.

16. The applicants stated that they had requested the information in their capacity as journalists, during the election campaign, and only regarding local candidates. The information published by the CEC was insufficient to uncover "doppelgangers" and to evaluate the candidates' competence, and therefore more detailed information had been needed. The CEC's lack of control over the photographs and biographical information used by the candidates for their posters had aggravated the situation. The candidates' photographs had remained completely inaccessible to the public, although they were simple business photographs with no scenes of private life and in any case, they had been provided in the context of elections to Parliament, so voters had a right to recognise their candidates by sight. The information requested had also been "ready and available".

17. The Court reiterates that a right of access to information held by a public authority may arise where such access is instrumental for the individual's exercise of his or her right to freedom of expression, and where its denial constitutes an interference with that right. The threshold criteria for such an assessment are: the purpose of the information request, the nature of the information sought, the role of the applicant, and whether the information was ready and available (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, §§ 149-80, 8 November 2016).

18. While being mindful of the divergent explanations given by the applicants in the requests themselves and before the domestic courts, the Court accepts that, overall, it is clear – and must have been clear to the domestic authorities – that the information requested was needed for the applicants' journalistic activities relating to the ongoing elections, in particular in view of possible unfair techniques used by candidates. For the same reasons, and despite the fact that there seem to have been no actual "doppelgangers" on the list of candidates, the Court considers that the information met the public interest test. This is further supported by the

CEC's own acknowledgment that it controlled neither the content nor the photographs included on the candidates' posters.

19. The role of the applicants as journalists playing an important "watchdog" function has not been contested. Neither is it in dispute that the information sought was ready and available.

20. Therefore, the CEC's refusals impaired the applicants' exercise of their freedom to receive and impart information as protected by Article 10 of the Convention.

21. The Government's preliminary objection must therefore be dismissed.

3. Conclusion

22. The Court further notes that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

23. The applicants argued that the Law on Elections provided that the information contained in the documents submitted by candidates as part of the registration process was classified as "open". The fact that the CEC was required to publish only certain information did not mean that that openness was thus limited to that information only. At the same time, the domestic courts had disregarded that particular provision and referred to a number of other competing legal norms without attempting to balance the two rights at stake. In the context of elections, and in view of the widespread use of unfair election practices, as well as the voters' right to know who their candidates were, access to the CVs and photographs outweighed the need to protect private life, if any such need was at stake in the circumstances.

24. The Government contended that the interference had been prescribed by law, while not specifying the law in question, and had pursued the legitimate aim of protecting the "rights of others". As to necessity, the fact that the law guaranteed access to certain information about candidates through the CEC's publication of that information and that the remaining information was protected as private information about people who had not yet been elected ensured the requisite balance between the applicants' right to freedom of expression and the need to protect private life.

25. The Court reiterates that an interference with an applicant's rights under Article 10 will infringe the Convention if it is not "prescribed by law", does not pursued one or more of the legitimate aims set out in that paragraph, or is not "necessary in a democratic society" in order to achieve those aims.

26. The Court observes that the domestic courts, having considered the provisions of the Law on Elections, found that they should be read in their entirety, meaning that it was for the CEC to publish certain types of

information about candidates, thus rendering it open, and that the candidates' consent was given for the dissemination of that information. The Court has already found that such an interpretation was not manifestly unreasonable (see *Centre for Democracy and the Rule of Law v. Ukraine*, no. 10090/16, § 109, 26 March 2020). The Court notes, however, that other legal provisions cited by the domestic courts, namely the Law on Information or the Law on Access to Public Information, allowed for the disclosure even of confidential information (such as personal data) if it was of general interest for society and if the right of the public to know it outweighed the potential harm of disclosure. The courts appear to have failed to apply the above test. Nevertheless, it is more appropriate to examine this issue under the necessity head.

27. As to the "legitimate aim" pursued, the Court is prepared to accept that the restriction of access to biographical information and photographs may be regarded as pursuing the aim of protecting the "rights of others" within the meaning of Article 10 § 2.

28. As to necessity, the Court observes that, just as in *Centre for Democracy and the Rule of Law* (cited above, § 105), the domestic authorities in the present case treated the information contained in the CVs as a single block, making no attempt to find a way to satisfy the applicants' requests without disclosing the candidates' sensitive data. Given that the applicants' requests were made in the context of forthcoming parliamentary elections, such a blanket refusal can hardly be reconciled with the importance for local voters to have information about candidates, who, by registering for the elections, inevitably put themselves into the public domain. And while in the present case the persons concerned were not prominent politicians already elected to Parliament, as in the case cited above, this does not preclude the importance of having access to detailed information about a local candidate before the elections take place. Indeed, such access might even be more important, bearing in mind that the persons concerned are less well known to the public. On that account, no proper balancing of the interests involved was carried out by the domestic courts.

29. The Court also cannot underestimate the CEC's acknowledgment that it had no control over the information and photographs the candidates used for their posters. An analysis of that argument by the CEC in the light of the applicants' repeated submissions about the widespread use of unfair techniques during elections is equally lacking in the domestic courts' judgments. Despite the fact that there seem to have been no actual "doppelgangers" in the Rivne Region during the elections at stake, such a lack of control could, in and of itself, have constituted a plausible ground for the applicants to doubt the accuracy of the information presented by the candidates in different sources and thus, in the circumstances of the present case, have warranted the disclosure of original source information, that is, the CVs and photographs as submitted to the CEC, with sensitive personal data

redacted in order to preserve the candidates' rights under Article 8 of the Convention (see, *mutatis mutandis*, *Volodymyr Torbich v. Ukraine* [Committee], no. 14957/13, § 30, 13 July 2023).

30. In view of the above, the Court finds that the blanket refusal to provide the applicants with copies of the candidates' CVs and photographs in the context of the election campaign was not "necessary in a democratic society".

31. There has accordingly been a violation of Article 10 of the Convention.

III. OTHER COMPLAINTS

32. The second applicant also complained under Article 6 of the Convention about the lengthy examination of his case by the domestic courts as, by the time the final judgment had been given, the elections had long been over.

33. Having regard to the facts of the case, the submissions of the parties, and its findings above, the Court considers that there is no need to give a separate ruling on the admissibility and merits of the applicants' complaint under Article 6 of the Convention (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

APPLICATION OF ARTICLE 41 OF THE CONVENTION

34. The applicants submitted that the finding of a violation would constitute sufficient just satisfaction.

35. The Government submitted that there was accordingly no call to make any award to the applicants.

36. The Court agrees that the violation of Article 10 must have caused non-pecuniary damage to the applicants. Having regard to the applicants' position in this respect, it concludes that the finding of a violation would constitute in itself sufficient just satisfaction.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Declares* the applications admissible;

3. *Holds* that there has been a violation of Article 10 of the Convention in respect of both applicants;

4. *Holds* that there is no need to examine the admissibility and merits of the second applicant's complaint under Article 6 of the Convention;

5. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants.

Done in English, and notified in writing on 28 March 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Carlo Ranzoni President

APPENDIX

No.	Application no.	Case name	Lodged on	Applicant Year of birth Place of residence Nationality	Represented by
1.	41713/13	Antonina Torbich v. Ukraine	12/06/2013	**Antonina Oleksandrivna TORBICH** 1980 Rivne Ukrainian	Lyudmyla Volodymyrivna OPRYSHKO
2.	29980/15	Volodymyr Torbich v. Ukraine	08/06/2015	**Volodymyr Anatoliyovych TORBICH** 1980 Rivne Ukrainian	Lyudmyla Volodymyrivna OPRYSHKO