



## Law used to fine Hungarian political party for mobile app lacked sufficient precision

In today's **Grand Chamber** judgment<sup>1</sup> in the case of [Magyar Kétfarkú Kutya Párt v. Hungary](#) (application no. 201/17) the European Court of Human Rights held,

by **16 votes to one**, that there had been a **violation of Article 10 (right to freedom of expression)** of the European Convention on Human Rights.

The case concerned a political party's mobile application which allowed voters to photograph, anonymously upload and comment on invalid votes cast during a referendum on immigration in 2016.

The Court found in particular that the provision of domestic election law relied on by the authorities (a breach of the principle of the exercise of rights in accordance with their purpose) had not allowed the applicant party to foresee that it could be penalised for providing such an app, which had been an exercise of its freedom of expression.

The considerable uncertainty about the potential effects of the provision had exceeded what was acceptable under the Convention and the lack of sufficient precision in the law to rule out arbitrariness and allow the applicant party to regulate its conduct had led to a violation of the Convention.

### Principal facts

The applicant, Magyar Kétfarkú Kutya Párt (The Hungarian Two-tailed Dog Party), is a political party registered in Budapest (Hungary).

In September 2016 the party, which satirises the political establishment and government, developed a mobile application to allow voters to show and comment on invalid ballots cast during a referendum on European Union migrant relocation plans.

The referendum, which was held in October 2016, had been called by the Government and had asked the question, "Do you want the European Union to be entitled to order the mandatory settlement of non-Hungarian citizens in Hungary without Parliament's consent?"

In the course of the campaign several opposition parties called on voters to boycott the referendum or to cast invalid ballots that would not count in the final tally but could still be interpreted as rejecting the idea of the referendum. The party developed the app, called "Cast an invalid ballot", in the context of that opposition.

Voters could use the app to post anonymous photographs of ballot papers, invalid or valid, and comments on reasons for how they had cast their ballots. Following a complaint by a private individual, the National Election Commission (NEC) fined the party after finding that the app constituted campaigning activity and had broken rules on fair elections, voting secrecy and the exercise of rights in accordance with their purpose.

1. Grand Chamber judgments are final (Article 44 of the Convention).

All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their 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).

The *Kúria* (the supreme court) ultimately only upheld the decision on the exercise of rights in accordance with their purpose and reduced the fine. A complaint to the Constitutional Court was deemed inadmissible.

## Complaints, procedure and composition of the Court

The applicant party complained about a violation of its rights under Article 10 (right to freedom of expression) of the European Convention on Human Rights.

The application was lodged with the European Court of Human Rights on 16 December 2016.

In its Chamber [judgment](#) of 23 January 2018, the European Court of Human Rights held, unanimously, that there had been a violation of Article 10 of the Convention.

The Chamber noted in particular that the applicant party had developed the mobile telephone application precisely for the purpose of allowing voters to use information and communication technologies to share opinions through anonymous photographs of invalid ballot papers. The app thus had a communicative value and so constituted expression on a matter of public interest. As the *Kúria* had emphasised, it was not possible to identify voters through the anonymously uploaded photographs and posting the photographs had not affected the fair conduct of the vote. The Chamber thus found that the restriction of the applicant party's freedom of expression had served no legitimate aim under paragraph 2 of Article 10 of the Convention.

On 28 May 2018 the Grand Chamber Panel accepted the Government's request that the case be referred to the Grand Chamber. A hearing was held on 21 November 2018.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Linos-Alexandre **Sicilianos** (Greece), *President*,  
Guido **Raimondi** (Italy),  
Robert **Spano** (Iceland),  
Jon Fridrik **Kjølbro** (Denmark),  
Angelika **Nußberger** (Germany),  
Paul **Lemmens** (Belgium),  
Síofra **O'Leary** (Ireland),  
Branko **Lubarda** (Serbia),  
Ledi **Bianku** (Albania),  
Valeriu **Griţco** (the Republic of Moldova),  
Dmitry **Dedov** (Russia),  
Stéphanie **Mourou-Vikström** (Monaco),  
Gabriele **Kucsko-Stadlmayer** (Austria),  
Alena **Poláčková** (Slovakia),  
Jolien **Schukking** (the Netherlands),  
Péter **Paczolay** (Hungary),  
Ivana **Jelić** (Montenegro),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar*.

## Decision of the Court

The Court found that the applicant party had been exercising its right to freedom of expression by launching the mobile application and encouraging voters to cast invalid ballots. The authorities' actions had interfered with that right, which could only be justified under certain circumstances, including being provided for by a law which was accessible and foreseeable as to its effect.

The authorities and courts had relied in particular on section 2(1)(e) of the Electoral Procedure Act (EPA), on the exercise of rights in accordance with their purpose, as one of the principles of electoral procedure, and on section 218 of the EPA on fines for breaches of campaigning rules.

Those legal instruments had been sufficiently accessible, but the key question for the Court was whether the applicant party could have known that taking and uploading photographs of ballot papers in an anonymous way would breach electoral law when there was no specific piece of legislation regulating such acts.

According to a 2008 Constitutional Court ruling, the EPA did not define what would count as a breach of the principle of the exercise of rights in accordance with their purpose, it falling to the National Election Commission and the courts to determine such questions on a case-by-case basis.

The lack of clarity in the provision thus meant that domestic authorities had to exercise particular caution when interpreting it given the possible risks for the enjoyment of voting-related rights, including the free discussion of public affairs.

The Court noted that the Constitutional Court and the *Kúria* had found in certain cases that the provision was breached if voting-related conduct had had “negative consequences” for others, including a violation of their rights. In the applicant party’s case, the *Kúria* had rejected some of the NEC’s allegations of alleged breaches of election law but had never explained how the party’s actions had had a “negative consequence”.

While the National Election Commission had issued Guidelines which banned photographs of ballot papers, the Guidelines were not legally binding. Moreover, the *Kúria* had only clarified the relevance and legal effects of the Guidelines after the referendum.

The Court noted that the applicant party’s case was the first time the domestic authorities had applied the principle of the exercise of rights in accordance with their purpose to the use of a mobile application for posting photographs of ballot papers in an anonymous way.

While the first-time application of a provision did not by itself make the interpretation of the law in question unforeseeable – every legal provision had at some point to be tested for the first time – in the applicant party’s case foreseeability had been particularly important as it had concerned restrictions on a political party’s freedom of expression in an election or referendum.

The Court found that the considerable uncertainty about the potential effects of the legal provisions applied by the domestic authorities had exceeded what was acceptable under the Convention.

It also concluded that the law applied to restrict the applicant party’s freedom of expression had not been formulated with sufficient precision to rule out any arbitrariness and allow the applicant party to regulate its conduct accordingly. There had therefore been a violation of Article 10 § 2 of the Convention and there was no need to examine the applicant party’s other arguments.

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

The Court held that Hungary was to pay the applicant party 330 euros (EUR) in respect of pecuniary damage and EUR 7,615 for costs and expenses.

### Separate opinions

Judge Dedov expressed a separate opinion which is annexed to the judgment.

*The judgment is available in English and French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.