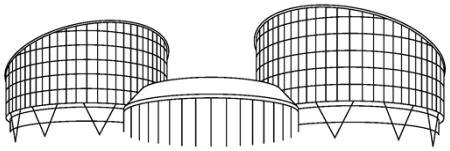

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF KOKËDHIMA v. ALBANIA

(Application no. 55159/16)

JUDGMENT

Art 3 P1 • Stand for election • Termination of Member of Parliament's mandate by the Constitutional Court on the ground that it was incompatible with his involvement in business activities through a company of which he was the sole shareholder and that drew income from contracts with State bodies • No issue as to the accessibility of the applicable laws and practice • Applicant did not take all measures necessary to terminate ongoing conflict of interest at the time of assuming his mandate • Impugned measure sufficiently foreseeable and not arbitrary

Prepared by the Registry. Does not bind the Court.

STRASBOURG

11 June 2024

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kokëdhima v. Albania,

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

Jolien Schukking*, President*,
Georgios A. Serghides,
Darian Pavli,
Peeter Roosma,
Andreas Zünd,
Oddný Mjöll Arnardóttir,
Diana Kovatcheva*, judges*,
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 55159/16) against the Republic of Albania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Albanian national, Mr Koço Kokëdhima ("the applicant"), on 15 September 2016;

the decision to give notice to the Albanian Government ("the Government") of the complaints under Article 8 of the Convention and Article 3 of Protocol No. 1 to the Convention, concerning the termination of the applicant's mandate as a Member of Parliament, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 21 May 2024,

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

INTRODUCTION

1. The application concerns the Constitutional Court's decision terminating the applicant's mandate as a Member of Parliament (MP) on the grounds that it was incompatible with his involvement in business activities through a company, Abissnet SHA. The applicant complained that his removal from office violated his right to carry out his parliamentary role, contrary to the guarantees under Article 3 of Protocol No. 1 to the Convention, and that it tarnished his reputation in violation of Article 8 of the Convention.

THE FACTS

2. The applicant was born in 1959 and lives in Tirana. He was represented by Mr A. Hajdari, a lawyer practising in Tirana.

3. The Government were represented by their Agent, Mr O. Moçka, General State Advocate.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant was the sole shareholder of the private joint-stock company Abissnet SHA between 29 October 1999, when the company was registered in Tirana, and 6 February 2014, when he sold his shares. Between 3 January and 2 August 2013 the company concluded contracts with numerous public authorities to provide internet and fixed telephony services.

6. On 23 June 2013 general parliamentary elections were held in Albania in which the applicant stood as a candidate.

7. On 25 July 2013 the applicant asked the High Inspectorate for the Declaration and Audit of Assets and Conflicts of Interest ("the High Inspectorate") for advice under section 42 (1) (f) of Law no. 9367 of 7 April 2005, '*On the prevention of conflicts of interest in the exercise of public functions'* ("Law no. 9367/2005"), about the potential conflict of interest that might arise from his being the shareholder of the company Abissnet SHA if he were to be elected as an MP.

8. On 31 July 2013 the applicant resigned from the position of manager at Abissnet SHA.

9. On 2 August 2013 the election of the applicant was certified by the Electoral College.

10. In a letter of 7 August 2013, the High Inspectorate instructed the applicant that it was his responsibility to prevent any conflict of interest, and that he could seek advice from Parliament, which assessed each case of a possible conflict of interest and advised what measures should be taken. The High Inspectorate also instructed the applicant that if he wished it to carry out an administrative investigation of his position he would have to provide it with a written authorisation for that purpose. The High Inspectorate informed the applicant that, in accordance with well-established legal procedure, he would be audited by the High Inspectorate for any conflict of interest, regardless of any checks carried out by the parliamentary authorities. Audits of officials would take place within one year of the submission of their declarations of private interests and those of persons related to them.

11. On an unspecified date the applicant approached the Speaker of Parliament about his situation.

12. In a letter of 18 October 2013, the Speaker of Parliament informed the applicant that the Human Resources and Management of Members of Parliament Service was the right body to deal with the issues he had raised. The letter stated that the Service had not previously handled cases concerning the investigation of conflicts of interest. The Parliamentary Legal Service provided guidance on the law on prevention of conflicts of interest which might be useful for the declaration of his assets and interests which the applicant would have to make before he began his mandate as an MP. It also informed the applicant that he could seek advice from the High Inspectorate about what constituted a conflict of interest, as provided in section 42 (1) (f) of Law no. 9367/2005.

13. On 6 February 2014 the applicant sold his shares in Abissnet SHA to another company and on 7 February 2014 the sale contract was registered with the National Business Centre.

14. In February 2015 the Democratic Party's Parliamentary Group, to which more than one-tenth of MPs belonged, submitted a request to Parliament under Article 73 of the Constitution, asking it to refer the question of whether the applicant's position as an MP was incompatible with his having been the shareholder of Abissnet SHA to the Constitutional Court.

15. On 10 March 2016 Parliament referred the case to the Constitutional Court.

16. In its judgment no. 32/2016 of 3 June 2016, the Constitutional Court declared the applicant's position as an MP incompatible with his prior position as the sole shareholder of Abissnet SHA. The Constitutional Court found that the applicant had acted contrary to Article 70 (3) of the Constitution, which provided that MPs were not allowed to engage in any profit-making activities that generated income from public assets.

The Constitutional Court took issue with the applicant's six-month delay in resolving the conflict of interest and noted that even though the applicant's company had not entered into any new agreements with public authorities after 2 August 2013, it had nevertheless continued to receive payments from those authorities under pre-existing contracts. It concluded that there had been a conflict of interest within the meaning of Article 70 § 3 of the Constitution between the applicant's position as an MP and his position as a shareholder of the company.

The court rejected the applicant's arguments that

(i) the relevant test should have been whether the company had entered into new contracts with public authorities after 2 August 2013, which it had not;

(ii) he had divested himself of his interests in the company before the end of the relevant financial year and had therefore received no dividend from the company's activities during the six-month period under examination;

(iii) any profits had been made only by the company, which was a distinct legal entity from the applicant; and

(iv) his removal from office would damage his reputation, amounting to a breach of Article 8 of the Convention and would interfere with his right to sit as an MP and the voters' rights to be represented by a candidate chosen by them.

17. The relevant part of the Constitutional Court's judgment reads as follows:

> "The provision regulating MPs' conflicts of interest (...) guarantees that the principles of the separation of powers, independence in the exercise of the parliamentary mandate and the avoidance of conflict of interest are observed.
>
> The constitutional legislator has decided that the regulation of conflicts of interest should be governed by special laws whereas Article 70 § 3 of the Constitution itself

provides that the function of an MP is incompatible with carrying out a profit-making activity which generates revenue from State assets.

This prohibition has been clearly and unequivocally expressed by the constitutional legislator, who aimed to eliminate all situations that might lead an MP to see his position as (...) a good opportunity to increase his private income (see the Constitutional Court's Judgment no. 7 of 24 February 2016).

The incompatibility has two principal aspects: firstly, there is a prohibition on [simultaneously] exercising two public functions; and, secondly, there is a prohibition on [simultaneously] exercising a public function and a private one of an economic nature (or otherwise).

In both cases the prohibition on exercising two functions is aimed at preventing one person or body having overlapping powers, thus avoiding the violation of the principle of separation and balance of powers and, consequently, the rule of law.

The prohibition on exercising more than one function also serves as a guarantee of the full and unreserved engagement of an official in the performance of the task undertaken by him, which could be reduced or made impossible by the commitment required by the simultaneous performance of another function by that official.

[Rules on] conflicts of interest protect the exercise of an MP's mandate and guarantee the impartiality of elected members (see the Constitutional Court's Judgment no. 44 of 7 October 2011).

The concept of incompatibility entails a prohibition on the holding of more than one duty or function, and it is irrelevant whether the official concerned [obtains] benefits because of his position or [there is] a conflict between his duty [as an official] and his private interests. The mere fact of exercising two functions or duties (public-public, public-private) is sufficient for him to be in violation of this prohibition. The [Constitutional] Court has emphasised that at the core of Article 70 § 3 of the Constitution lies one of the basic principles of exercising public functions, based on the principle: one salary or reward for one duty or function.

Even when an official is allowed to hold two public duties/functions, he is still entitled to receive [only] one salary/reward.

If an MP, in addition to his salary, were to receive any other income from the State budget for his primary profession, then this principle would be breached. The principle of the best possible service to the people and the principle of democracy are served where every public official gives all his attention and time to fulfilling the role to which he has been elected or appointed and which he has freely accepted. The opposite of this carries, naturally, [a risk of raising] reasonable doubts in the mind of the public about the quality of its representation (see the Constitutional Court's Judgment no. 44 of 7 October 2011).

The Constitutional Court found as follows with regard to the date at which the conflict of interest began:

As to the starting point of an MP's mandate, the [Constitutional] Court has held that the legal consequences of a [member's] mandate come into effect at the moment when the candidate is declared an MP by the Central Election Commission (CEC). From that moment on he is required to meet all the constitutional and legal requirements entailed by the prohibition on carrying out other activities and the obligation to disclose his financial interests, as provided in Article 70 of the Constitution and in other laws.

An MP's powers and duties are related to the function of Parliament, as the member must be an MP as a precondition for the mandate itself, but an MP's position is not won in Parliament: it is won during the election process where voters freely express their preferences among the candidates. The moment when an MP takes the parliamentary oath marks the date of the beginning of the exercise of his duty as an MP and not the beginning of his powers and functions.

The [Constitutional] Court, ruling on Article 70 § 3 of the Constitution, held that the requirement not to draw any profits/revenues from State assets derives directly from this provision, which explicitly prohibits not only the exercise of profit-making activities connected with the property of the State or local government, but also acquiring ownership of such property, regardless of how it is acquired.

The [Constitutional] Court notes that the contracts concluded between the parties for the provision of internet and fixed telephony services were contracts which would not be fully executed immediately but which would be carried out over time. Consequently, the obligations of the parties under these contracts continued even after the [applicant] started sitting as an MP.

The [Constitutional] Court finds that despite the facts that these contracts were concluded before the announcement [of the election results] and that the company Abissnet SHA has not participated in any procurement procedure and has not concluded any other contracts with State institutions since 2 August 2013, these facts do not, from the constitutional standpoint, simply exempt the MP concerned from any responsibility, since it has been accepted and proved in the present proceedings that, regardless of the point at which legal relations between the parties were created or began operating, the company of which MP Koço Kokëdhima was the sole shareholder continued to receive income from State assets, including when he was sitting as an MP.

Even after 2 August 2013 when Koço Kokëdhima was declared elected, the company continued to obtain income from the contracts it had previously concluded, including payments made to the company by State institutions.

Article 70 § 3 of the Constitution cannot be read in isolation from the content of Article 70 in its entirety, which is essentially aimed at avoiding conflicts of interest in the exercise of public functions and sets out rules, means, methods, procedures, responsibilities and competencies for the identification, declaration, registration, treatment, resolution and punishment of [those responsible] in cases of conflicts of interest, with reference to law no. 9367/2005.

The [Constitutional] Court emphasises that even though it is not for it to determine or provide guidelines as to the specific measures or actions that should be taken by MPs before taking office in order to avoid conflicts of interest in the future, it considers it appropriate to stress that it is the duty of MPs, in accordance with the entire constitutional and legal framework, to take the necessary measures to comply with the obligations they have as MPs."

As to the applicant's conduct after being elected, the Constitutional Court made the following findings:

"The [Constitutional] Court notes that at the time he became an MP, Koço Kokëdhima, as a shareholder of the company Abissnet SHA and despite being aware of all the contracts concluded between that company and State institutions and the benefits deriving from those contracts, did not take the steps necessary to avoid conflicts of interest before starting to sit as an MP. The company continued to receive income while he was exercising that mandate, up until 6 February 2014.

The applicant's claim that Article 70 § 3 of the Constitution refers to 'benefits' to an MP and not to the receipts of a legal person other than him, and that he, while he was an MP, did not receive any direct or indirect benefit as a shareholder of the company, since the company did not declare any dividends from the profits it made from payments made by State institutions, is also constitutionally inadmissible.

The [Constitutional] Court finds that Article 70 § 3 of the Constitution and the constitutional jurisprudence do not make a distinction between legal and natural persons or between activities carried out separately by these legal persons, nor have they made it a requirement for the prohibition at issue to operate that there be a direct benefit to an MP from the activity concerned.

Even if the applicant did not directly benefit from the contracts concluded by the company of which he was a shareholder, as the income thus obtained was not deposited in the account he held as a natural person, he nevertheless indirectly profited from that income since it increased the capital of the company and, consequently, the value of the shares he owned, which meant that, directly or indirectly, the company's activities were profitable for its shareholder.

Whether an economic activity is exercised by an MP as a natural person or in some other form within a company in which he participates, it is constitutionally important that the activity does not generate income originating from the assets of the State or local government, and that the MP does not acquire State assets, regardless of the purpose for which the assets might be used or the final destination of the revenue thus obtained.

In view of the above, the Constitutional Court finds that the actions of the MP Koço Kokëdhima were in conflict with his role as an MP, contrary to Article 70 § 3 of the Constitution."

18. In accordance with the judgment of the Constitutional Court, which is the sole and final instance in such cases, the applicant was debarred from remaining an MP.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. The Constitution

19. The relevant provisions of the Constitution read as follows:

"Article 70

1. Members of Parliament represent the people and are not bound by any obligatory mandate.

2. Members of Parliament shall not simultaneously exercise any other public duty, with the exception of that of a member of the Council of Ministers. Other cases of incompatibility are specified by law.

3. Members of Parliament shall not carry out any profit-making activity that stems from the property of the State or local government, nor shall they acquire property from them.

4. For every violation of paragraph 3 of this Article, on the referral of the Speaker of the Assembly or one-tenth of its members, the Assembly decides on sending the case to the Constitutional Court, which decides on the incompatibility..

Article 71

1. The mandate of a member of parliament starts on the day he is declared elected by the respective electoral commission.

2. The mandate of a member of parliament ends, or is invalidated, as the case may be:

(...)

c) when one of the conditions of ineligibility or incompatibility provided in Articles 69 and 70 (2) and (3) [of the Constitution] is established (...)."

B. Law no. 9367 "On the prevention of conflicts of interest in the exercise of public functions" of 7 April 2005, as amended ("Law no. 9367/2005")

20. The relevant provisions of Law no. 9367/2005 read as follows:

"Section 3 - Definitions

1. A 'conflict of interest' is a situation of conflict between the public duty and the private interests of an official, insofar as his direct or indirect private interests affect, might affect or might seem to affect, in an inappropriate manner, the performance of his public duties and activities.

(...)

A 'continuing conflict of interest' is a situation in which a conflict of interest might occur repeatedly and/or frequently in the future.

(...)

Section 6 – Performance of Public Duties and the Obligation to Prevent Conflicts of Interests

1. On his election or appointment and on a continuing basis, an official has a duty to prevent any situation of conflict of interest arising and, if one should arise, to resolve it himself as soon as possible and in the most effective way. In cases where the official is not certain whether a conflict of interest concerning him exists, he should consult his supervisor as soon as possible.

2. Every supervisor and higher authority should take all necessary measures to prevent and resolve cases of conflict of interest.

[...]

Section 21 - Prohibition on Contracting

1. Where officials exercise one of the functions defined in Chapter III, subchapter 2 of this law [including that of Member of Parliament], ..., commercial companies, partnerships or simple partnerships of which the official actively or passively owns

shares or capital of whatever amount may not contract or sub-contract with any public entity. (...)

Section 28 - Restrictions on the activities of Members of Parliament

A Member of Parliament:

a) may not be a manager or member of the management bodies of profit-making organisations;

b) may not exercise income-generating private activities as an entrepreneur, in partnership with entrepreneurs of any type [*personit fizik tregtar, ortakëri personash fizikë tregtarë të çdo forme*], or as an advocate, notary public, licensed expert or consultant, agent or representative of the organisations defined in paragraph "a" of this section and may not be employed full-time to perform any other duty;

c) may not hold, in an active manner, any share or capital in a commercial company, if that company has a dominant position in the market.

[...]

Section 37 - The basic means of addressing and resolving conflict of interest

For the earliest and most effective prevention of every conflict of interest of any kind:

1. The official himself must, in the exercise of his functions and in advance if the circumstances require it, take steps to prevent or resolve every situation of conflict of interest arising in any form and in proportion to the importance of the situation in, as the case may be and as appropriate, one or more of the following ways:

a) transferring or selling private interests [to third parties]; (...)

(...)

c) cancelling private engagements, duties or functions that are in conflict with his public function;

ç) resigning from his public position, especially where continuing conflicts of interest emerge.

2. The official must inform his superior or superior body, as the case may be, of the solution suggested or implemented by him/her and provide the reasoning and justification of that solution.

3. Notwithstanding that he/she carries out the requirements in paragraphs 1 and 2 of this section, the official is not released from responsibility for being in a situation of conflict of interest if the measures taken by him are not effective in eliminating the conflict of interest.

(...)

Section 38 - Resolution of Particular Cases of Continuing Conflict of Interest

1. For the categories of officials defined in chapter III subdivision 2 of this law [including Members of Parliament], when the treatment and resolution of a continuing conflict of interest cannot be achieved through the means provided for in section 37 of this law, in order for the official to continue to stay in the same position, he/she shall:

[...]

c) transfer active ownership of the shares or capital that he/she owns to another person...

3. A transfer in accordance with paragraph "c" of sub-section 1 of this section or [the selling of the shares to another person] [*tjetërsim*]... shall be carried out as soon as possible, but no later than two months from when the obligation arises. The official must make known and document the fulfilment of this obligation immediately, and no later than 15 days from the performance of this action. ....

4. The time periods defined in paragraph 3 of this section may be extended by a superior or a superior institution when the official presents reasonable grounds for an extension. In every case, the reasons for the extension and the new time periods must be recorded and documented, but these time periods may never be more than twice the time periods defined above, with the exception of cases when the extension is dictated by the procedural time periods specified by the Constitution, procedural laws, commercial legislation and/or the rules under which public institutions issue official documents and/or judicial acts are performed, or when the time period is extended because of an assessment by the Competition Authority that the company holds a dominant market position.

[...]

7. If the official or related person is not willing to comply with the requirements of the [preceding] paragraphs of this article, then the official must resign from the office within the time periods defined in this section.

[...]

Section 42 - Powers of the High Inspectorate for the Declaration and Audit of Assets and Conflicts of Interests

1. The High Inspectorate, in its capacity as the central authority responsible for the implementation of this law, performs the following duties and has the following responsibilities:

...

f) advising particular officials, superiors, and superior institutions, at their request, about specific cases where there appears to be a conflict of interest and questions of ethics related to those cases, as well as on the periodical registration of interests."

C. Law no. 9901 "On entrepreneurs and companies" of 14 April 2008, as amended

21. The relevant provisions of Law no. 9901 "On entrepreneurs and companies" of 14 April 2008, as amended, read as follows:

"Section 76 - Profit Distribution

1. Members are entitled to a share of the profit declared in the annual profit and loss account, unless otherwise provided by the Statute.

2. The profit shall be distributed among the members in proportion to their shares, unless otherwise provided by the Statute."

II. DOMESTIC CASE-LAW

The Constitutional Court case-law on Article 70 of the Constitution

22. In its decision no. 44 of 7 October 2011, the Constitutional Court found that I.B.'s position as an Member of Parliament was incompatible with his being a shareholder of a company which had concluded contracts with public authorities in the period between his election and his taking of the parliamentary oath, which had been delayed for a significant time. The relevant part of that decision reads as follows:

> "The [Constitutional] Court considers that:
>
> (i) [the mandate of] a Member of Parliament runs from the moment when the final result of the election is announced and continues until the constitution of the next parliament, that is, its first session;
>
> (ii) a Member [of Parliament] begins to exercise his mandate immediately after taking the oath of office, from which time he begins to enjoy certain rights and duties relating to his term of office;
>
> (iii) the term of office of a new Parliament begins with its first session after the final results of the elections are announced, and continues until the first meeting of the next Parliament.
>
> The [Constitutional] Court finds that candidates for election are not necessarily expected to give up any source of livelihood before being elected, as this would be contrary to their individual right to a private life and respect for their personal dignity. Nevertheless, an MP must take all measures to avoid any situation of incompatibility or conflict of interest that may arise at the beginning of a term of office and for as long as that mandate lasts. Concrete actions for this purpose need to be taken no later than the time when the final results of elections are announced, when the MP also has security and clarity as regards his financial income.
>
> The [Constitutional] Court emphasises that the legal consequences of the MP's mandate begin at the point when the candidate is declared a Member of Parliament by the Central Election Commission. From this moment, the MP must comply with all constitutional and legal requirements related to the prohibition on carrying out other activities and making disclosures related to his financial interests, as provided in Article 70 of the Constitution and in other relevant laws.
>
> The concept of conflict of interest is regulated across various legal systems partly by their constitutions and partly by special laws. If an activity conflicts with the function of a Member of Parliament, that will mean that he may not exercise that other function, only that of a Member of Parliament or of the Government.
>
> The main focus of the provisions relating to conflicts of interest has two aspects: the first relates to the prohibition on holding two public offices, whereas the second relates to the prohibition on exercising public and private functions at the same time. In both cases, the prohibition on retaining double functions is intended to prevent the overlapping of powers where they are conferred on the same person or body and so not to disturb the principle of the separation of powers and, consequently, the rule of law. In addition, the prohibition on the performance of more than one function also serves to ensure the full and unreserved commitment of an official to the performance of the duties he is entrusted with, which could be diminished or made impossible because of

the particular commitment which the performance of more than one function simultaneously might require. The principle of incompatibility protects the exercise of the mandate and guarantees the impartiality of elected representatives. It consists of the legal impossibility of keeping the function for which the person concerned has been elected and [at the same time] carrying out certain activities considered by the legislator to be incompatible with the mandate of an MP.

The [Constitutional] Court emphasises that the definition of a conflict of interest is based primarily on the principle of the separation of powers, but also on the principle of State neutrality, according to which State bodies or their agents should not be linked to or dependent on economic interests. As regards treating holding more than one office as a conflict of interest, it is not necessary for a public servant to make a profit because of his [other] position, or that he is in a conflict of interest as regards his official function and his private interests. That prohibition comes into play as soon as [the same person] exercises both functions (public-public, public-private). Given that the question under consideration raises the need to establish the incompatibility between the public service and the private activity of a profit-making nature deriving from State assets, the [Constitutional] Court holds that it must consider only this aspect.

The prohibition of a Member of Parliament from engaging in private activity in general is not absolute. Some European legal systems allow such a possibility, with certain restrictions. Allowing a Member [of Parliament] to hold a licence to practise his primary profession is based on the principle that an MP should not be completely separated from the labour market or deprived of the possibility of practising his primary profession merely because he undertakes to represent the interests of the people in representative bodies. On the other hand, the prohibition to exercise a profession is based on the fact that the function of a member of parliament is a full-time job and must be treated as such in all laws of the State. It is necessary to consider not only the "time" element but also the "salary" element. The function of an MP is remunerated in accordance with the general economic and financial level of the country. The purpose is that an MP should not worry about his income during the term of office, so to be able to better serve the office to which he is elected.

Article 70 § 2 of the Constitution prohibits the exercise of other functions by an MP. Article 70 § 3 also provides that the exercise of "profit-making activity that stems from the property of the State or the local government and acquiring State assets" is incompatible with the function of an MP. Other prohibitions are provided for in special laws. It follows from these provisions that our Constitution delegates [the regulation of] conflicts of interest to specific laws (Article 70 § 2). The ban on MPs carrying out profit-making activities where the incomes comes from State resources is constitutionally imposed by the Constitution itself. This prohibition is clearly and unequivocally expressed by the legislator, whose objective has been the complete elimination of any possibility of using the office of MP as a good opportunity to [accumulate] private income because of the favourable position of a member of the highest representative body."

As to why I.B.'s position as a Member of Parliament was untenable, the Constitutional Court held as follows:

"The [Constitutional] Court considers that the point when an MP takes the oath marks the beginning of the exercise of his duties as a Member of Parliament, and not the time when he is declared to be a Member of Parliament [after the constitution of parliament]. Under Article 71 § 1 of the Constitution, even though I.B. took the oath as an MP on 25 February 2010, his mandate had been acquired at the time of the announcement by

the CEC of his election to Parliament, therefore, on 1 August 2009 and not on the day when he took the oath.

Having examined the facts and circumstances of the case at issue as a whole, the [Constitutional] Court finds that as an MP I.B. had a conflict of interest within the meaning of Article 70 § 3 of the Constitution when he participated in the call for tenders organised by the Durrës Municipality and when he signed a contract with its representatives (...), since he had already been elected and declared to be an MP.

When his election as an MP was certified by the CEC, I.B. had an obligation to avoid any form of conflict of interest. His principal argument, that at that time he was not a Member of Parliament since he had not yet taken the oath, is unfounded. Firstly, his mandate had begun on 1 August 2009, and he received income from the Municipality of Durrës on 17 February 2010 and 21 May 2010.

Secondly, his failure to take the oath promptly cannot be presented as a legitimate ground since it was the result of his personal decision based on political motives which were made public after the final election result. The fact that he took the oath several months after the certification of the election results by the CEC did not exempt him from the responsibility of fulfilling the obligations that derived from that mandate, which had begun months earlier."

23. In its decision no. 7 of 24 February 2016, the Constitutional Court gave its interpretation of Article 70 § 4 of the Constitution as follows:

"When the Speaker of Parliament or one tenth of its Members ask Parliament to refer a request concerning an MP who has a conflict of interest under paragraph 3 of Article 70 of the Constitution, Parliament should send the case to the Constitutional Court, which is the only body competent to assess a conflict of interest between an MP's [activities] and his mandate as an MP."

THE LAW

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

24. The applicant complained about the manner in which the Constitutional Court had interpreted the legislation relevant to assessing his alleged conflict of interest, resulting in the termination of his mandate. He relied on Article 3 of Protocol No. 1, which reads as follows:

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

A. Admissibility

25. The Government objected that the applicant no longer had victim status because the consequences of the Constitutional Court's judgment had concerned only his term of office between 2013 and 2017, and he had been able to register and stand as a candidate in the next elections.

26. The applicant argued that he was directly affected by the Constitutional Court's finding that his activities were incompatible with his mandate, breaching his rights guaranteed under Article 3 of Protocol No. 1.

27. The Court reiterates that to deprive an applicant of victim status the authorities must fulfil two conditions: they must acknowledge, at least in essence, a violation of the Convention, and they must provide the applicant with "sufficient redress" (see *Amuur v. France*, 25 June 1996, § 36, *Reports of Judgments and Decisions* 1996-III; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; and *Rotaru v. Romania* [GC], no. 28341/95, § 35, ECHR 2000-V).

28. The Court notes that the Albanian authorities, notably the Constitutional Court, have neither acknowledged the breach of the applicant's Convention rights nor afforded him redress for that breach. Consequently, the applicant has not lost his status of victim within the meaning of Article 34 of the Convention.

29. Therefore, the Court rejects the Government's objection that the applicant no longer has standing as a victim under Article 34 of the Convention.

30. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

31. The applicant stressed at the outset that he did not question the aims pursued by the domestic legislation which made certain activities incompatible with the mandate of an MP, in fulfilment of Article 70 of the Constitution, nor did he object to the severity of the sanction in a case of such incompatibility – the termination of the MP's mandate. However, he argued that the Constitutional Court's interpretation of that legislation in his case had been overly broad and not foreseeable.

32. He argued that there had been only one previous decision of the Constitutional Court interpreting Article 70 of the Constitution (see paragraph 22 above). In that decision the Constitutional Court had held that the mandate of an MP began when the election results were announced by the Central Electoral Commission. The applicant in that case had been a partner in a company that had concluded contracts with local government agencies for computer services after he had been declared elected as an MP. The applicant argued that his own mandate had been certified by the Judicial Electoral College on 2 August 2013 whereas the contracts that the Constitutional Court found put him in a situation of conflict of interest had

been concluded before that date. The judgment of the Constitutional Court in his case had therefore not been foreseeable to him or in accordance with the law. From the date when his election as MP had been declared, he had prevented Abissnet SHA from participating in any public procurement or concluding any contracts with public institutions in order to avoid any conflict with his new position. Furthermore, he had sold his shares in Abissnet SHA in February 2014, not because of any perceived conflict of interest but to ensure that the company's activities would no longer be hindered by his constitutional constraints.

33. The applicant also argued that the High Inspectorate's Legal Commentary No. 4 was the only official guide on situations of conflict of interest for public officials under Law no. 9367/2005 and did not treat pre-existing contracts with public authorities which had been concluded prior to the person assuming a governmental position as conflicts of interest that had to be resolved before taking office.

34. The applicant stressed that on registering as a candidate for the parliamentary elections he had taken all necessary precautions and had showed a high level of diligence in order to avoid any conflict of interest. He had written to the High Inspectorate on 25 July 2013 to seek advice on his shareholding in a company (Abissnet SHA) that was carrying out pre-existing contracts for the provision of internet services to certain public institutions. The applicant argued that the High Inspectorate had a statutory duty, under section 42 (1) (f) of Law no. 9367/2005, to provide the advice sought; instead, the Inspectorate had instructed him to seek advice from Parliament. When he did so, the parliamentary administration had referred him back to the High Inspectorate.

35. In the absence of any clear official advice, the applicant had taken steps to prevent Abissnet SHA from entering into any further contracts with public bodies. His reading of section 21 (1) of Law no. 9367/2005 had been that the relevant prohibition became applicable from the moment a person standing for election as an MP was declared to have won a parliamentary seat.

36. The Constitutional Court had held that the purpose of Article 70 § 3 of the Constitution was to ensure that MPs did not use their position as a means of advancing their private interests and obtaining additional financial benefits. The applicant argued that he had in no way used his position for any such purposes. All Abissnet SHA's income after 2 August 2013 had come from contracts it had concluded prior to that date, when he was a private citizen. The Constitutional Court's finding in his case had therefore run contrary to the purposes the Constitutional Court had previously attributed to the constitutional legislator in enacting the provision.

37. What was more, he had not earned any income from any of the Abissnet SHA contracts that had been concluded prior to 2 August 2013 since the company had not distributed any dividends to its shareholders between 2 August 2013 and 6 February 2014, the day when he sold his shares.

38. He further argued that it had not been legally possible for Abissnet SHA to withdraw from the contracts it had previously entered into with State bodies.

39. Given the applicable constitutional and legislative provisions, their legislative history, and the practice of the High Inspectorate at the relevant time, the manner in which the Constitutional Court had interpreted Article 70 § 3 of the Constitution therefore could not have been foreseeable to the applicant at the time.

(b) The Government

40. The Government submitted that the Constitution itself was the primary reference as regards safeguards against the abuse of power by MPs. In addition, Law no. 9367/2005, which regulated in greater detail the avoidance of conflict of interest by all public officials, was complementary to the Constitution. However, the only body that could adjudicate in cases of alleged abuse of power or conflict of interest by MPs was the Constitutional Court.

41. The prohibition imposed on MPs against engaging in any activity deriving income from State assets was set out in Article 70 § 3 of the Constitution, and was therefore established at the level of a constitutional norm. When a question arose as to whether an MP had engaged in any such activity, Parliament was required to refer the matter to the Constitutional Court.

42. The applicant's case had been properly referred to the Constitutional Court and the applicant had had the opportunity to present his arguments and evidence to that court. The Government argued that the fact that the applicant had sold his Abissnet SHA shares, although belatedly, suggested that he had been aware that his continued ownership of those shares had been in violation of the Constitution and the law and that it had been his responsibility to take all steps necessary to avoid the conflict of interest.

43. The Government further argued that under Law no. 9367/2005 it was clear that an official could not own any stake or be involved in any other manner in a company which obtained income from public funds.

44. The Constitutional Court's approach in the applicant's case had been foreseeable, taking into account the text of Article 70 of the Constitution and the prior jurisprudence of the Constitutional Court. Article 70 §§ 2 and 3 of the Constitution provided that an MP could not exercise any other public function besides that of a member of the Council of Ministers and could not carry out any profit-making activity that drew income from State assets. The latter provision was aimed at preventing elected officials from using their function to generate income for themselves or third parties from State assets. On the other hand, MPs were allowed to carry out certain other income-generating activities which were unrelated to State funds.

45. The Government further pointed out that section 28 of Law no. 9367/2005 prohibited an elected official from

(i) serving as a manager or a member of a management body of a profit-making organisation;

(ii) exercising income-generating private activity as an entrepreneur [*person fizik tregtar*], advocate, notary public, licensed expert or consultant, agent or representative of profit-making entities under (i); or

(iii) being an active shareholder of a commercial company that occupied a dominant market position.

46. The Government argued that in its previous decision no. 44 of 2011 the Constitutional Court had taken the same position as in the applicant's case, namely that the legal consequences of holding an MP's mandate began at the time when a candidate's election was certified by the Central Election Commission, and that an MP had to take concrete action to avoid any situations of incompatibility or conflict of interest from the moment when the final results of the elections were announced. The applicant had been aware of that prior constitutional jurisprudence since he had referred to it in his pleadings in the Constitutional Court. However, the applicant had not taken any steps following the announcement of his election as an MP to avoid a possible conflict of interest because of his ownership of Abissnet SHA and its ongoing public procurement contracts. In the Government's view the applicant's argument that he personally had not received any payments derived from public resources was irrelevant because, as a shareholder, he had indirectly profited from them. The Constitution and Law no. 9367/2005 categorically provided that from the moment an MP was declared elected, he should take measures to stop any involvement in commercial activities benefitting from State resources.

47. The Government argued that the applicant could have relinquished his ownership of the shares and transferred them to a person who would hold them on trust for him.

48. The Government concluded that the position taken by the Constitutional Court in his case was foreseeable to the applicant.

2. The Court's assessment

(a) General principles

(i) Article 3 of Protocol No. 1 generally and concerning Members of Parliament

49. The relevant general principles are stated in *Tahirov v. Azerbaijan* (no. 31953/11, 11 June 2015) as follows:

> "53. Article 3 of Protocol No. 1 enshrines a characteristic principle of an effective political democracy and is accordingly of prime importance in the Convention system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47, Series A no. 113). The Court has established that it guarantees individual rights, including the right to vote and to stand for election (ibid., §§ 46-51).

54. The rights bestowed by Article 3 of Protocol No. 1 are not absolute and there is room for "implied limitations". In their internal legal orders the Contracting States may make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3. While the Contracting States enjoy a wide margin of appreciation in this sphere, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with. In particular, it has to satisfy itself that the conditions 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, and *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 109, ECHR 2008). Such conditions 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 v. the United Kingdom* (no. 2) [GC], no. 74025/01, § 62, ECHR 2005 IX).

55. States have broad latitude to establish constitutional rules on the status of members of parliament, including criteria for declaring them ineligible. These criteria vary according to the historical and political factors specific to each State. For the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another (see *Mathieu-Mohin and Clerfayt*, cited above, § 54; and *Melnychenko v. Ukraine*, no. 17707/02, § 55, ECHR 2004 X).

56. The Court observed that stricter conditions may be imposed on the eligibility to stand for election to parliament, as distinguished from voting eligibility (see *Melnychenko*, cited above, § 57). On that point, it took the view that, while it is true that States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires that the eligibility procedure contain sufficient safeguards to prevent arbitrary decisions (see *Podkolzina v. Latvia*, no. 46726/99, § 35, ECHR 2002 II, and *Yumak and Sadak*, cited above, § 109 (v))."

50. Further to this, the Court has held that in examining compliance with Article 3 of Protocol No. 1, it does not apply the traditional tests of "necessity" or "pressing social need" which are used in the context of Articles 8 to 11 of the Convention; instead, it has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether a restriction has interfered with the free expression of the opinion of the people (see *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 109 (iii), 8 July 2008).

(ii) General principles concerning the quality of law and the interpretation of domestic law

51. The Court reiterates that, unlike other provisions of the Convention, the text of Article 3 of Protocol No. 1 to the Convention does not contain an express reference to the "lawfulness" of any measures taken by the State (see *Yabloko Russian United Democratic Party and Others v. Russia*, no. 18860/07, § 75, 8 November 2016). However, in the light of the principle

that conditions imposed on the exercise of individual rights guaranteed by Article 3 of Protocol No. 1 may not curtail these rights to such an extent as to impair their very essence and deprive them of their effectiveness, as well as the general Convention requirement that rights must be effective and not illusory, the Court considers that where, as in the present case, restrictions on eligibility to stand for election are provided for by law, the law should satisfy certain minimum requirements as to its quality, such as the requirement of accessibility and foreseeability (see *Seyidzade v. Azerbaijan*, no. 37700/05, § 33, 3 December 2009). Furthermore, the Court refers to its well-established case-law to the effect that a disputed measure must have some basis in domestic law and must also be compatible with the rule of law, which is expressly mentioned in the Preamble to the Convention and is inherent in all its Articles (see *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 249, 22 December 2020).

52. In cases concerning the alleged violation of Article 3 of Protocol No. 1, the Court has also had regard to the importance of the notion of "lawfulness" inherent in the Convention (see *Ādamsons v. Latvia*, no. 3669/03, §§ 116-19, 24 June 2008, where the Court, at the outset of its analysis, assessed the lawfulness of a legislative restriction on passive electoral rights; see also *Yumak and Sadak*, cited above, § 118, where the Court, at the outset of its analysis, noted that the issue of the foreseeability of the legislative measure complained of was not in dispute in that particular case).

53. The Court has held that the law is "foreseeable" when an individual is able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail, and when it indicates the scope of discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interferences (see, for example, *Selahattin Demirtaş*, cited above, § 249, and *Ljaskaj v. Croatia*, no. 58630/11, § 65, 20 December 2016).

54. However, many laws are more or less vague, and their interpretation and application are a question of practice (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 141, ECHR 2012). No matter how clearly drafted a legal provision may be there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances (compare, for example, *Imeri v. Croatia*, no. 77668/14, § 75, 24 June 2021).

55. The scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. The mere fact that a legal provision is capable of more than one construction does not mean that it fails to meet the requirement of "foreseeability" for the purposes of the Convention. The role of adjudication vested in the courts is precisely

to dissipate such interpretation doubts as remain, taking into account the changes in everyday practice (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 65, 17 February 2004). The concept of "law" comprises statutory law as well as case-law (see *Mullai and Others v. Albania*, no. 9074/07, § 113, 23 March 2010).

56. The interpretation of this legislative framework by the domestic authorities – primarily the courts – should not be arbitrary or lacking in proportionality; such decisions must be sufficiently reasoned (see *Yabloko Russian United Democratic Party and Others*, cited above, § 75).

57. In this context the Court reiterates that its power to review compliance with domestic law is limited. It is primarily for the national authorities, notably the courts, to interpret and apply domestic law, even in those fields where the Convention "incorporates" the rules of that law, since the domestic authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection. This is particularly true when, as in this instance, the case turns on questions of interpretation of national constitutional law. Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, 20 March 2018).

(b) Application of those principles to the present case

58. It is not disputed that the termination of the applicant's office as an MP by the Constitutional Court amounted to an interference with his rights protected under Article 3 of Protocol No. 1. The parties also agreed that in principle the domestic legislation on prevention of conflict of interests concerning MPs pursued legitimate aims such as ensuring their impartiality and public confidence in the legislature, and avoiding situations in which they might use their position to profit from State resources.

59. The Court notes that the primary issue in dispute in the present case is the alleged unforeseeability and arbitrariness of the measure taken (compare *Seyidzade*, cited above, § 32).

60. In this connection the applicant argued that the interpretation of Article 70 § 3 of the Constitution by the Constitutional Court had been overly broad and unforeseeable. Accordingly, the main thrust of the applicant's complaint concerns the interpretation of the relevant law by the Constitutional Court.

61. The Court first observes that Article 70 § 3 of the Constitution prohibits MPs from carrying out any activity that generates a profit from State resources. Furthermore, section 21 of Law no. 9367/2005 makes clear that MPs, like other public officials, are banned from entering into "a contract or sub-contract with any public institution"; the same applies to any companies in which an official holds any property interest (see paragraph 20 above). The jurisprudence of the Constitutional Court, notably its decision no. 44 (2011)

involving another Member of Parliament whose company had concluded procurement contracts with State entities (see paragraph 22 above), was also clear in this respect. There was therefore little doubt at the relevant time that active ownership of a company that drew income from contracts with State bodies constituted an activity incompatible with the mandate of an MP under national law.

62. Secondly, a question arises in the present case as to whether the ban also foreseeably applied to pre-existing government contracts made by a candidate, or by a company in which he or she held a property interest, which were expected to continue to generate revenue after he or she became an MP. If so, the Court should further assess whether it was sufficiently foreseeable to the applicant what legal steps he was required to take in order to ensure he was not in a situation of conflict of interest on assuming the functions of an MP.

63. The Court notes in this respect that the company Abissnet SHA, of which the applicant was the sole shareholder, had concluded contracts for providing internet and fixed telephony services to various public authorities before the applicant's election was declared. The company continued to draw income under these contracts even after the applicant started his parliamentary mandate.

64. The applicant argued that the company had stopped participating in public bids as soon as his election had been declared. However, he does not dispute that the company continued to derive income from contracts previously concluded with public authorities. In that connection, the Court observes that in its decision no. 44 (2011), the Constitutional Court had adopted a relatively strict interpretation of constitutional and statutory restrictions on MPs engaging in activities deriving profit from State assets. The approach of the Constitutional Court is based on a reading of Article 70 of the Constitution as a whole, which prohibits MPs not only from profiting from State resources through their private economic activities but also from exercising any other public functions, with the single exception of serving as a member of the Cabinet (see Article 70 § 2 of the Constitution, as complemented by section 28 of Law no. 9367/2005, which extends the definition of a conflict of interest to any full-time private activity, paragraph 20 above). In its 2011 decision the Constitutional Court interpreted these prohibitions as extending to an MP who had any source of income from the public purse other than their parliamentary salary and benefits (see paragraph 22 above). For the Constitutional Court, what was decisive in the applicant's case was not the timing of the conclusion of the contracts but the fact that the State payments to the company under those contracts had continued even after the applicant had assumed his role as an MP. The Court does not see any element of arbitrariness in that approach.

65. As to whether such an approach should have been foreseeable to the applicant, the Court observes that the applicant must have been well aware

that the contracts at issue, the last of which had been concluded on 2 August 2013, the date the applicant was elected, would continue to generate income into the period of his mandate as an MP. Furthermore, it should have been foreseeable to him, on the basis of previous constitutional jurisprudence and the legislation on conflicts of interest, that benefitting from such continued payments would be regarded as incompatible with his function as an MP. In that sense, the prohibition imposed on MPs by Article 70 § 3 of the Constitution was arguably even more stringent than the general restrictions applicable to public officials under Law no. 9367/2005.

66. The Court observes in this regard that the applicant did seek legal guidance on the matter from the Inspectorate and the parliamentary administration, and that, regrettably, both of those bodies failed to provide a clear response. However, the very fact that he requested such guidance suggests that he was aware of at least the possibility that continued payments under the company's State contracts might give rise to a conflict of interest with his potential parliamentary functions. At the same time, the applicant has not provided any explanations for his failure to authorise the Inspectorate to conduct a formal audit of his situation of conflict of interest, as requested by that authority (see paragraph 10 above).

67. Turning to the question of the applicant's diligence, the Court will take due account of the findings of the Constitutional Court in assessing whether he took the steps that were foreseeably necessary to avoid the conflict of interest arising from his ownership of Abissnet SHA, in accordance with domestic law and practice. In that connection the Court notes that the Constitutional Court had held in its decision no. 44 (2011) that "a candidate must take all measures [necessary] to prevent any situation of incompatibility or conflict of interest that may arise at the time of assuming his mandate in Parliament"; and that such measures should in principle be in place from the moment the Electoral Commission declared the MPs elected.

68. The Court further observes that even under the more flexible general rules of Law no. 9367/2005, the deadline for taking steps to terminate an ongoing conflict of interest is two months from the date the conflict arises (see section 38 (3) of that Law, cited in paragraph 20 above). However, the applicant sold his Abissnet SHA shares only on 6 February 2014, that is, more than six months after his election had been declared on 2 August 2013.

69. Under section 37 (3) of Law no. 9367/2005, notwithstanding any uncertainty as to whether a conflict exists or any advice obtained from a "superior institution", the ultimate responsibility rests with the official who, in case of doubt, should take all steps necessary to prevent any conflict of interest. In view of this, the fact that the applicant's inquiries with the High Inspectorate and Parliament's administration about a possible incompatibility remained unanswered cannot be considered decisive.

70. As to the issue of accessibility, it has not been contested that the provisions of the Constitution and Law no. 9367 were generally accessible

given that they had been published. As regards the Constitutional Court's decision no. 44(2011), which clarified that court's approach to the interpretation of Article 70 § 3 of the Constitution, the Government claimed that the applicant had referred to it in his pleadings in the Constitutional Court and the applicant has not contested that assertion. That decision was therefore also accessible and known to the applicant. The Court therefore concludes that there is no issue as to the accessibility of the applicable laws and practice to the applicant in the present case.

71. Given the above considerations, the Court is unable to conclude that the judgment of the Constitutional Court terminating the applicant's mandate as an MP was arbitrary or not sufficiently foreseeable to the applicant.

72. Lastly, the Court observes that the applicant did not argue that the termination of his mandate was disproportionate. As a result, there is no reason to consider that "the free expression of the opinion of the people in the choice of the legislature" was thwarted in any respect (compare *Gitonas and Others v. Greece*, 1 July 1997, § 44, *Reports of Judgments and Decisions* 1997-IV).

73. Therefore, there has not been a violation of Article 3 of Protocol No. 1 to the Convention.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

74. The applicant complained that the Constitutional Court's reasons for terminating his mandate violated his rights under Article 8 of the Convention which reads as follows:

> "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."

75. The applicant argued that the Constitutional Court's decision terminating his mandate had been grounded in the unfair assumption that he had taken advantage of his position to profit from public resources. As the matter had been widely covered by the national media, his reputation had been tarnished.

76. The Government contested that claim.

77. The Court reiterates that the right to protection of one's reputation is covered by Article 8 of the Convention as part of the right to respect for private life (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI; *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007; *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010; and *Annen v. Germany*, no. 3690/10, § 54,

26 November 2015). For Article 8 to be engaged, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 137, ECHR 2015).

78. In the present case the main Convention question involves the applicant's rights under Article 3 of Protocol No. 1, which the Court has already addressed. As assessed above, the applicant did not adjust his conduct to the foreseeable requirements of the law, in particular the Constitution, which resulted in the termination of his mandate as an MP. The Court has already held that Article 8 cannot be relied on in order to complain of a loss of reputation that is the foreseeable consequence of one's own actions, such as, for example, the commission of a criminal offence (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012; and *Faludy-Kovács v. Hungary*, no. 20487/13, § 26, 23 January 2018). Even though the applicant's conduct in no manner amounted to a criminal offence, he was nevertheless found to have fallen foul of a constitutional ban.

79. In the Court's case-law, the protection of a person's reputation has generally been addressed in situations of published factual allegations of such a seriously offensive nature that they inevitably had a direct effect on the applicant's private life. However, in the present case, even though the termination of the applicant's mandate as an MP must have been known to the general public and must at least to a certain extent have raised questions about his conduct, the applicant has not shown that its consequences constituted such a serious interference with his private life that they amounted to a serious attack on his reputation. In that connection the Court observes that, contrary to the applicant's assertions, the Constitutional Court did not find that the applicant had used his position to profit from public resources but that the applicant had not promptly taken all the actions legally required to prevent a conflict of interest arising between his mandate as MP and his ownership of a company that received revenue from public resources. The Constitutional Court did not question in any way that the procurement contracts at issue had been concluded prior to the applicant becoming an MP. However, the Constitutional Court held that the applicant had failed to act diligently to comply with the strict duties of an elected MP as regards the avoidance of a conflict of interest. The consequences of the termination of the applicant's mandate as MP, as regards the applicant's right to respect for his private life, are therefore the foreseeable outcome of his own conduct.

80. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 3 of Protocol No. 1 admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 3 of Protocol No. 1.

Done in English, and notified in writing on 11 June 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Jolien Schukking
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) Concurring opinion of Judge Serghides;
(b) Concurring opinion of Judge Pavli.

CONCURRING OPINION OF JUDGE SERGHIDES

1. The case concerns the removal of the applicant from office as Member of Parliament (MP) by the Constitutional Court because he was a shareholder in a company which had entered into contracts with public authorities to provide internet and telephone services. The company continued to generate revenue from these contracts even after the applicant's election. This was found to be in violation of the constitutional prohibition barring MPs from engaging in business activities that derived profit from State assets. The applicant complained that his removal from office violated his right to carry out his parliamentary duties, in breach of his right under Article 3 of Protocol No. 1 to the Convention, and tarnished his reputation in breach of his right to respect for his private life under Article 8 of the Convention. The Court found that there had been no violation of Article 3 of Protocol No. 1 to the Convention (see point 2 of the operative provisions of the judgment) and rejected the Article 8 complaint as inadmissible (see point 1 of the operative provisions).

2. I voted in favour of both operative provisions of the judgment and I will explain why I concur.

3. In paragraph 79 of the judgment, two reasons are given for the Court's finding in paragraph 80, as reflected in the second part of point 1 of the operative provisions, that the complaint under Article 8 is manifestly ill-founded and must therefore be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. The first reason is that "the applicant has not shown that its consequences [i.e., the consequences of his removal from office as MP] constituted such a serious interference with his private life that they amounted to a serious attack on his reputation" (paragraph 79 of the judgment). The second reason is that "the Constitutional Court held that the applicant failed to act diligently to comply with the strict duties of an elected MP as regards the avoidance of a conflict of interest" (ibid), and that "[t]he consequences of the termination of the applicant's mandate as MP, as regards the applicant's right to respect for his private life, are therefore the foreseeable outcome of his own conduct" (ibid).

4. While I agree with the Court's second reason for finding that the complaint under Article 8 is manifestly unfounded, I consider that its first reason should not have been referred to at all. Given that his removal from office could have been foreseen as the outcome of his conduct, in particular of his failure to act diligently to comply with the strict duties of an elected MP regarding the avoidance of conflicts of interest, the applicant cannot justifiably complain that he suffered serious interference with his private life in breach of Article 8 § 1 of the Convention as a result of this removal. In this connection, the Latin maxim, namely, *ex turpi causa non oritur actio* (see Wharton's *Law Lexicon*, 371) is relevant. This means in English that a plaintiff will be unable to pursue legal relief and damages if the claim arises

in connection with his or her own tortious act. The first reason for finding the Article 8 complaint inadmissible, concerning the lack of seriousness of the interference, in other words the failure to reach the pertinent threshold to engage Article 8 (see paragraph 77), should only have been discussed if the applicant's removal from office had not been based on his failure to act diligently and had not been foreseeable by him.

5. Consequently, the reasoning of the judgment in paragraph 79, by including the first ground explained above, is methodologically and conceptually erroneous.

6. Had the second ground given by the judgment not been valid, I would have found a violation of Article 8 § 1 of the Convention, since I consider that dismissal from his role as MP constitutes a serious interference with the applicant's right to respect for his private life under that Convention provision.

CONCURRING OPINION OF JUDGE PAVLI

1. I am in full and unreserved agreement with the unanimous outcome and reasoning of the present judgment. The Court has concluded that the removal of the applicant from office by the Constitutional Court was "sufficiently foreseeable" in the light of the circumstances of the case and that court's prior jurisprudence (see paragraph 71 of the judgment). The considerations presented in this separate opinion have no bearing on the outcome of the present case, but relate to the general functioning of the constitutional regime on patrimonial conflicts of interest for members of parliament.

2. Cases such as the current one come to the Court through an unusual route, namely one in which the national constitutional court acts as a court of first and final instance. As such, they present certain challenges both for the apex national court, which acts as a tribunal of both fact and law, as well as the Strasbourg Court, in its supervisory capacity as an (uncommon) second-instance review body.

3. The reasons for this arrangement follow from the sovereign choices of the national Constitution-maker, which, first, included a conflict of interest provision directly in the constitutional text (Article 70 § 3, cited in paragraph 19 of the judgment); and, secondly, granted the Constitutional Court sole authority to resolve any disputes related to the application of that provision (ibid). A third relevant factor is that Parliament has chosen not to adopt any primary legislation, or other regulations, for the implementation of Article 70 § 3 – apart from a provision in the Rules of Parliament, added after the facts of the present case, which deals exclusively with the procedural aspects of referring such a dispute to the Constitutional Court.

4. The absence of a more detailed normative framework means that any and all legal questions, including any grey areas of possible uncertainty, regarding the application of Article 70 § 3 can be resolved only through the decision-making of the Constitutional Court. By definition, this can only be done *ex post facto*, creating at least a theoretical potential for legal uncertainty in some scenarios (but not so in the present case, as already emphasised). There is no process for seeking a prior advisory opinion from that court, and other State bodies may be reluctant to play an advisory role in the absence of clear jurisprudential guidance by the constitutional arbiter on any specific or technical aspects of the prohibition.

5. As today's judgment notes, there exists in Albania an extensive legal regime – under Law no. 9367 (2005), as amended (see paragraph 20 of the judgment) – governing conflicts of interest for public officials. This legal regime is also applicable to members of parliament, either in the same way as other senior officials or through provisions that specifically regulate certain conflicts of interest of MPs (see, for example, section 28 of the Act). However, those provisions do not touch upon the ground of incompatibility foreseen under Article 70 § 3 of the Constitution.

6. Instead, section 21 of Law no. 9367 includes a general ban on senior public officials (including MPs), or any commercial entities in which they hold any property interest, from entering into "a contract or sub-contract with any public entity". The only exceptions to this wide-ranging ban include contracts for services that are offered to the general public in a non-preferential manner (e.g. for household water supply and sanitation), or in some other enumerated situations (see section 21(4) of the Act). However, there is no definition in Law no. 9367 of what constitutes a "contract or sub-contract with a public entity"; or any indication as to how this concept correlates to the constitutional notion of "profit-making activity that stems from State assets".

7. As a result, neither Law no. 9367, nor, to my knowledge, any other piece of national legislation includes any provisions seeking to clarify or spell out the scope of the ban contained in Article 70 § 3 of the Constitution, which has therefore been left to the sole and exclusive interpretation of the Constitutional Court. It can be argued here, even by way of simple textual comparison, that the constitutional ban on "any profit-making activity that stems [*buron* in Albanian] from the property of the State or local government" is wider in scope than the statutory ban on contracting with public entities. In other respects, the constitutional ban might be seen as less stringent, or at least less precisely regulated, than the ban on contracting under Law no. 9367. For example, does the constitutional ban extend to a "profit-making activity" that is connected to a State service or benefit that is offered to the general public on a non-preferential basis (*compare* section 21(4)(b) of Law no. 9367)?

8. As things stand, there is not necessarily a perfect overlap between the general restrictions on the private activities of senior public officials and the special prohibition that Article 70 § 3 of the Constitution has reserved specifically to MPs. On its face, the latter provision is capable of being applied to a fairly wide range of situations in which MPs can be deemed to have "drawn financial profit", directly or indirectly, from the public purse. It is clear that the scope of the ban is within the margin of appreciation of the national *pouvoir constituant*. At the same time, rule of law principles, as well as the jurisprudence of this Court, require that any interference with the exercise of the parliamentary function to a full term should be sufficiently clear and foreseeable to both MPs and the electorate at large.

9. It is equally obvious that, under the current constitutional scheme, the Albanian Constitutional Court will always have the final say on whether MPs find themselves in a patrimonial conflict of interest that would be incompatible with their office under constitutional Article 70 § 3. The same would apply to any possible legislative regulation seeking to clarify the terms of the said constitutional ban, whose compatibility with the Constitution itself would ultimately be subject to review by the highest court of the land. At the same time, constitutional jurisprudence on these matters remains limited and,

as already noted, it can deal with any novel or not entirely clear aspects of the ban only in an *ex post facto* fashion.

9. In conclusion, it is my view that a more detailed legislative regulation, to be developed and updated in full respect for any existing and future constitutional construction of the relevant provision, would be beneficial to legal certainty in this delicate area. What is at stake, after all, is nothing less than a cardinal value of democracy: ensuring respect for "the free expression of the opinion of the people in the choice of the legislature".