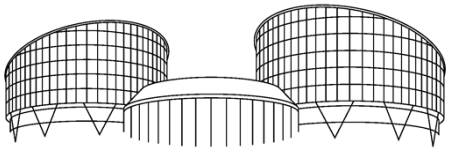

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF TOPLAK AND MRAK v. SLOVENIA

(Applications nos. 34591/19 and 42545/19)

JUDGMENT

Art 1 P12 • Art 13 • Prohibition of discrimination • Effective remedy • Adequate positive measures enabling disabled applicants to exercise their right to vote freely and by secret ballot at 2015 National Referendum • Lack of domestic remedy in respect of complaints as to accessibility of polling stations and voting procedure
Art 14 • Art. 3 P1 • Art 13 • Discrimination • Free expression of the people • Lack of voting machines not discriminatory for disabled voter allowed to be assisted by a person of his own choice under legal duty to respect secrecy • Technology-assisted voting not a necessary requirement needing immediate implementation, especially in the absence of European consensus • Complaint as to the abolition of the use of voting machines thoroughly examined by the Constitutional Court • Effective compensatory remedy available for any alleged discrimination in the exercise of the right to vote

STRASBOURG

26 October 2021

FINAL

28/02/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Toplak and Mrak v. Slovenia,

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

Jon Fridrik Kjølbro, *President,*
Carlo Ranzoni,
Valeriu Griţco,
Egidijus Kūris,
Pauliine Koskelo,
Marko Bošnjak,
Saadet Yüksel, *judges,*
and Stanley Naismith, *Section Registrar,*

Having regard to:

the applications (nos. 34591/19 and 42545/19) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Slovenian nationals, Mr Franc Toplak and Mr Iztok Mrak ("the applicants"), on 24 June 2019 and 5 August 2019 respectively;

the decision to give notice of the applications to the Slovenian Government ("the Government");

the observations submitted by the respondent Government and the observations in reply submitted by the applicants;

the comments submitted by third parties, namely the Harvard Law School Project on Disability, the Centre for Disability Law and Policy, Advocate of the Principle of Equality and the European Network of Equality Bodies, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 21 September 2021,

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

INTRODUCTION

1. The case concerns the alleged lack of adequate measures to allow the applicants, who had muscular dystrophy, to vote in the 2019 elections to the European Parliament and in a 2015 national referendum and the alleged lack of effective remedies in this regard.

THE FACTS

2. The first applicant, Mr Toplak, was born in 1937 and lived in Maribor. The second applicant, Mr Mrak, was born in 1983 and lives in Ljubljana. They were represented by Mr S. Vesenjak, a lawyer practising in Maribor.

3. The Government were represented by their Agent, Mrs B. Jovin Hrastnik.

4. On 19 July 2019 the first applicant died. His daughters, Nataša Toplak and Renata Toplak, informed the Court that they wished to continue the proceedings before the Court in his stead.

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

6. The applicants were, together with a number of other voters with disabilities, involved in numerous sets of proceedings aimed at improving the access of people with disabilities to the voting process. The sets of proceedings detailed below constitute only a minor part of this larger endeavour, in which the claimants were mainly unsuccessful before the Slovenian courts, except for petitions for constitutional review leading to the Constitutional Court's decision of 2014, which is summarised below (see paragraphs 43-45 below).

I. THE APPLICANTS' DISABILITY

7. Both applicants had muscular dystrophy and used electric wheelchairs for mobility. The first applicant's condition deteriorated in 2018, which meant that he was no longer able to hold a pen.

II. 2015 REFERENDUM

8. In 2014 the Constitutional Court ruled that the legislature should, within two years, adopt legal provisions ensuring the accessibility of all polling stations to people with disabilities (see paragraphs 43-45 below). In 2015 almost 50% of polling stations in Slovenia were physically accessible to people with disabilities.

9. Further to the decision by the National Assembly of 4 November 2015, the National Election Commission ("the National Commission") announced that a referendum concerning amendments to the Marriage and Family Relations Act would be held on 20 December 2015 ("the 2015 Referendum"). The announcement provided, *inter alia*, that voters with disabilities who considered that the polling station of their local electoral area was not accessible to them should inform their district election commission ("the district commission") in advance of their intention to vote at a polling station that was accessible to people with disabilities or at a polling station with an available voting machine.

A. Relevant events before the 2015 Referendum and the proceedings relating to the legal actions brought by the applicants

1. The first applicant

10. On 16 November 2015 the National Commission received a letter from the first applicant in which he requested that the polling station for his

local electoral area be accessible for people with disabilities. He specified the required width of the path and ramp, the angle of the ramp, and its bearing capacity, and requested access to the voting booth, voting table and ballot box. The National Commission forwarded his letter to the district commission in Maribor, asking it to verify whether the polling station indicated in the first applicant's request could be accessed without obstacles by people with disabilities and, if not, whether it would be possible to install a ramp in accordance with the technical requirements specified by the first applicant.

11. On 21 November 2015 the first applicant, together with another person, Š., brought an action in the Administrative Court against the National Commission seeking (i) the provision of access for people with disabilities at their local polling station and (ii) the ordering of an interim measure in order to ensure the accessibility of that polling station during the upcoming referendum. The first applicant and Š. argued that all voters, including those with a disability, had the right to vote at the polling station for their local electoral area and requested that the Administrative Court order the State to ensure on the day of the referendum (20 December 2015), and for all subsequent referendums and elections, that their respective polling stations would be wheelchair-accessible; this would entail the making of all necessary adjustments to voting booths and ballot boxes. They set out specific details concerning wheelchair accessibility. On 3 December 2015, the claimants specified that the action had been brought under section 4 of the Administrative Disputes Act (see paragraph 48 below) in respect of an alleged violation of human rights.

12. In the meantime, on 23 November 2015 the National Commission asked a private company to provide it with a price quote for installing a ramp for the entrance to the first applicant's local polling station. The following day the director of the National Commission informed the first applicant that his polling station would be equipped with a ramp. On the same day, his nephew replied on behalf of the first applicant, asking for confirmation that other conditions set out in his request would also be complied with.

13. On 4 December 2015 the Administrative Court issued a judgment and decision dismissing the action and rejecting a motion for an interim measure. It pointed out that the two-year deadline for remedying the incompatibility of the National Assembly Elections Act ("the Elections Act") with the Constitution imposed on the legislature by the Constitutional Court's decision had not yet expired (see paragraphs 43-45 below). It was furthermore noted that the claimants' access to their local polling station had been ensured and that their assumptions regarding the inaccessibility of voting booths and ballot boxes were based only on certain past experiences. Certain *ad hoc* adaptations could be made in practice (regardless of the existing regulatory framework), and it was up to the electoral bodies to do

what was necessary to secure the rights of voters. The court referred to the correspondence between the first applicant, the National Commission and the district commission and found that the first applicant had failed to prove an interference with his right to vote.

14. On 10 December 2015 – that is to say prior to the 2015 Referendum – the first applicant and Š. lodged an appeal. They also requested the Supreme Court to issue an interim decision ordering the necessary adjustments to be made before the 2015 Referendum. The request for the interim decision was dismissed on 16 December 2015 by the Supreme Court, which found, *inter alia*, that the defendant had undertaken to secure the conditions necessary for the appellants to exercise their right to vote, in line with the Constitution and the relevant legislation. On 5 July 2016 the Supreme Court rejected the appeal lodged by the first applicant and Š., explaining that, under section 4 of the Administrative Disputes Act, the judicial protection of human rights was possible only if a different form of judicial protection had not already been available. In the instant case, however, protection had already been offered under the Referendums and Popular Initiatives Act ("the Referendums Act") (see paragraph 46 below). Furthermore, the judicial protection provided under section 4 of the Administrative Disputes Act was not intended to protect against future actions that could potentially interfere with a person's legal position, but rather only related to acts that had already occurred.

15. On 12 September 2016 the first applicant and Š. lodged a constitutional complaint (no. Up 771/16). They alleged, *inter alia*, that the Administrative Court had violated their right to non-discrimination in the exercise of their right to participate in the management of public affairs (as protected, respectively, by Articles 14 and 44 of the Constitution) and that the Supreme Court had denied them the only effective remedy. At the same time the first applicant lodged a petition for a review of the constitutionality of several statutes that allegedly failed to provide for the speedy resolution of election-related disputes.

16. On 5 December 2018 the Constitutional Court decided not to accept the constitutional complaint for consideration. It specified that the petition for constitutional review would be dealt with separately (see paragraph 32 below). The decision was served on the first applicant on 31 December 2018.

2. The second applicant

17. On 16 November 2015 the National Commission received a letter from the second applicant requesting that the polling station for his local electoral area be made accessible to people with disabilities. In his letter, the second applicant set out the changes that would be necessary in order to render the polling station accessible to people with disabilities; those specifications were similar to those set out by the first applicant (see

paragraph 10 above). The director of the National Commission contacted the second applicant's district commission, which replied that the second applicant's local polling station, which was a school, would be accessible to wheelchair users. After being informed of this the second applicant pointed out that the school was surrounded by a fence and that the ballot boxes were normally on a higher floor, which could be accessed only by stairs. In further correspondence, the district commission affirmed that the polling station was accessible and submitted photos in this regard. The second applicant noticed that the photos showed a side entry, which previously he had not been able to use, and proposed that a visit of the school be carried out in order to verify the accessibility of the premises.

18. On 17 December 2015 an official note was made by the district commission, which indicated that the second applicant had made a visit and that it had been established that access to the polling station had been arranged directly from the parking area through the side entry to the school, which was equipped with a ramp. There was also a ramp leading to the floor on which the polling rooms were situated. It was also noted that the school had in the past had a pupil with a disability who had used the ramp and that all other voters would be entering the building this way in order to prevent any kind of discrimination. This polling station was subsequently also formally declared accessible to people with disabilities.

19. In the light of the lack of proper access for people with disabilities to their local polling station (in contravention of both section 9 of the Equality of Opportunities for People with Disabilities Act and the Constitution), on 17 December 2015 the second applicant, together with another person, A., brought an action in the Administrative Court seeking the provision of access to their local polling station for people with disabilities, and lodged with the Administrative Court an application for the ordering of an interim measure against the National Commission and the district commissions concerned. The second applicant and A. submitted arguments similar to those submitted by the first applicant and Š. (see paragraph 11 above).

20. On 18 December, the Administrative Court dismissed both the action (after examining it under section 4 of the Administrative Disputes Act) and the request for an interim measure. Referring to the above-mentioned correspondence between the second applicant and the electoral bodies, the visit that had been carried out, and the submissions made by the National Commission during the proceedings, the court found that the defendants had ensured that the second applicant's local polling station would be accessible to people with disabilities. It also noted that upon receiving a request from a voter with disabilities, the relevant authorities were under an obligation to do everything within their power to ensure necessary and appropriate changes and adaptations, provided that they did not impose a disproportionate or unnecessary burden. This was so regardless of whether such an obligation was set out also by the relevant legislation.

21. On 4 January 2016, the second applicant and A. lodged an appeal. They described the situation at the polling station on the day of the 2015 Referendum. The second applicant indicated that he had been able to access the polling station with his wheelchair, mark and deposit his ballot paper, and leave. However, he alleged that the ramp by the entrance had been steep and thus not in compliance with accessibility standards. In his submissions, he stated that he had been afraid when using the ramp, and that when he had been using the ramp he had needed assistance from a passer-by. He asserted that he had suffered discrimination because he had not been able to make his way along the ramp without the assistance of others.

22. On 5 July 2016 the Supreme Court rejected the appeal on the same grounds as those cited as justification for the rejection of the appeal lodged by the first applicant and Š. (see paragraph 14 above).

23. On 12 September 2016 the second applicant and A. lodged a constitutional complaint (no. Up-770/16) containing similar arguments to those submitted by the first applicant and Š. in their own constitutional complaint (see paragraph 15 above). They alleged, *inter alia*, that on the day of the 2015 Referendum their polling stations had been inaccessible.

24. On 28 January 2019, the Constitutional Court decided not to accept for consideration the constitutional complaint of the second applicant and A. The decision was served on the second applicant on 5 February 2019.

B. The applicants' participation in the 2015 Referendum

25. Both applicants voted in the 2015 Referendum. In his application form, the first applicant did not submit any details concerning his voting. In his observations he acknowledged that he had voted. He furthermore explained that he had been accompanied by several people, including his daughter and nephew, who had recorded a video and published it on Facebook on the same day. According to the first applicant, owing to the positioning of the furniture he had only been able to cast his vote in the middle of the room on the table with several people around him, which had compromised the secrecy of his vote. The election committee had allegedly not permitted the voting booths to be moved. Photos published on Facebook by the first applicant's nephew, Mr Jurij Toplak, and subsequently submitted by the first applicant's representative show the first applicant proceeding independently up the ramp leading to the polling station. They also show him inside the polling station at a table divided by a partition. The table appears to be of a height that would have allowed the first applicant to access the material left on it. One person is standing next to him. It is unclear whether that person was helping the first applicant or was marking his own ballot paper. One more person can be seen on the other side of the table (possibly behind the partition). The photos on Facebook were

accompanied by text that read: "My uncle, Franc Toplak, voted in an accessible polling station today. One polling station adjusted, 3000 to go."

26. The second applicant submitted that he had had to wait outside the polling situation until he had asked a passer-by to push him up the ramp, which was situated at the back entrance. He seemed, moreover, to imply that the voting booth and ballot box that he had used had not been adjusted to the needs of people with disabilities.

III. 2019 EUROPEAN PARLIAMENT ELECTIONS

27. Under the Elections Act, as amended by the 2017 Amendment (see paragraph 42 below), all polling stations were required to be accessible to people with disabilities as of 1 February 2018. It is unclear what, other than entry to the polling station, the required level of accessibility involved. The Government submitted that, in general, the furniture inside polling stations (tables and chairs) was of standard dimensions, partitions designed to secure the secrecy of the voting procedure were positioned on the floor and the ballot boxes were placed on tables.

28. On 9 April 2019 the National Commission announced that elections to choose Slovenian members of the European Parliament ("the 2019 EP Elections") would be held on 26 May 2019. The announcement included the information that voters with disabilities should inform their local district commission if they wished to vote by post. It also provided that those who could not vote at the polling station owing to illness should inform the relevant district commission by 22 May 2019 of their intention to vote from home. Requests to be permitted to vote by mail or from home could also be made *via* a dedicated Internet site.

29. The first applicant submitted in his application form that a ramp had been installed but that in all other aspects the polling station had not been rendered accessible. The second applicant submitted that his polling station "[had not been] made accessible in any way". They both submitted that they had been unable to "enter a little polling room with a wheelchair [owing] to a narrow door entry [and that] the ballot box and the desk [had been] too high and inaccessible, and no accessible voting methods or equipment [had been] available". It can be seen from the submissions lodged by the first applicant, in reply to those of the Government, that he did not participate in the 2019 EP Election owing to a deterioration in his condition. According to him, he had no longer been able to use a pen and had not wished to be assisted by another person.

30. The Government submitted copies of the voting directory from the second applicant's local polling station; the directory contained the name and signature of the second applicant, who had apparently voted in the election. The records of the election committee responsible for the second

applicant's local polling station do not contain any complaint made by participants.

IV. REVIEW OF LEGISATION BY THE CONSTITUTIONAL COURT

31. On 28 September 2018 a number of petitioners, including the second applicant, requested to be allowed to join the proceedings in respect of the petition for constitutional review lodged by the first applicant (see paragraphs 15 and 16 above). Together with the first applicant, they submitted additional arguments concerning, *inter alia*, sections 79 and 79a of the Elections Act (see paragraphs 40 and 42 below). They submitted that the Constitutional Court's 2014 decision, which required all polling stations to be accessible to people with disabilities (see paragraphs 43-45 below), had been implemented by the amendments to the Elections Act as far as the physical accessibility of polling stations was concerned (see paragraph 42 below), but not with respect to voting machines. They emphasised that proceedings that concerned elections and were initiated in a timely manner should be completed before the election day in question. They also submitted that polling stations could be properly adjusted before local elections that were to take place in two months' time.

32. On 21 February 2019 the Constitutional Court rejected as manifestly ill-founded the petition for constitutional review in so far as it concerned the issue of a speedy resolution of election-related disputes. As regards sections 79 and 79a of the Elections Act (see paragraphs 38-42 below) and the issue of the non-implementation of the Constitutional Court's 2014 decision, it noted that the conditions for suspending the effect of the above-mentioned provisions had not been met but that consideration of the petition would be given absolute priority.

33. On 22 October 2020 the Constitutional Court delivered a decision in which it examined the implementation of its 2014 decision (see paragraphs 43-45 below). It found that the Elections Act, as amended by the 2017 Amendment (see paragraph 42 below), was not incompatible with the Constitution. It noted that section 79a, which had been inserted into the Elections Act by the 2017 Amendment, explicitly provided that polling stations must be accessible to people with disabilities and that the petitioners themselves had considered that as regards this aspect the Constitutional Court's 2014 decision had been properly implemented. As regards the availability of voting machines, it noted that the use of voting machines had been ended by the 2017 Amendment and that a new assessment of the compatibility of the election legislation with the Constitution was required in that respect. The Constitutional Court noted that the petitioners' main argument was that the legislature should have adopted measures that would allow every person with a disability to vote autonomously, under conditions of secrecy, and at the nearest polling

station to his or her residence without having to give advance notice of his or her attendance.

34. The Constitutional Court cited: the United Nations Convention on the Rights of People with Disabilities ("the CRPD") – especially Article 29 thereof; the Venice Commission's Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections; and the Parliamentary Assembly of the Council of Europe's resolution entitled "The political rights of people with disabilities: a democratic issue" (see paragraphs 54, 58, 59 and 60-62 below).

35. The Constitutional Court took account of the arguments submitted by the Government and the National Assembly – specifically, that only a very small number (in 2015 only 0.2% of people with disabilities) had used voting machines, that such machines could not facilitate voting by people suffering from all types of disability, that their use was very expensive and that a new mode of voting for people with disabilities (namely, voting by post) had been introduced by the 2017 Amendment. The Constitutional Court also noted that the Elections Act also provided for assisted voting and that that mode of voting was also envisaged in the above-mentioned international instruments. Referring to the relevant provisions of the Elections Act and the Penal Code, the Constitutional Court stated that the law should be interpreted as imposing on the person assisting the person with a disability the obligation to respect the secrecy of the ballot. It also noted that election committees (see paragraphs 38 and 40 below) had little scope to exercise discretion in taking decisions. When confronted by a person with a disability an election committee had merely – as regards the voting assistants – to ascertain his or her identity and to note his or her name in its records. The Constitutional Court furthermore examined the regulation governing voting at home, which it considered to be applicable also to people with disabilities. The Constitutional Court, referring to a "reasonable accommodation" (*primerna prilagoditev*), noted that the legislature was under the obligation to ensure that people with disabilities could as much as possible exercise their right to vote in person, autonomously, in conditions of secrecy and at a polling station, but that the legislature was not under an obligation to adopt measures that would impose a disproportionate or unnecessary burden.

36. The Constitutional Court went on to note that a 2018 decision of the United Nations Committee on the Rights of People with Disabilities ("the CRPD Committee") concerning a case brought by Fiona Given against Australia (see paragraph 57 below), on which the petitioners had relied, could not be understood as having done away with the concept of a "disproportionate burden". It furthermore noted that only three European countries (Belgium, France and Bulgaria) continued to use voting machines to a different extent, and that voting with the assistance of another person

was a method of voting permitted in almost all European countries. The Constitutional Court concluded that assisted voting, as regulated in Slovenia, was in line with the principle of reasonable accommodation.

RELEVANT DOMESTIC LEGAL FRAMEWORK AND PRACTICE

I. THE CONSTITUTION

37. The relevant parts of the Constitution of the Republic of Slovenia read as follows:

Article 90
(Legislative Referendum)

"...The right to vote in a referendum is enjoyed by all citizens who are eligible to vote in elections ..."

Article 160
(Powers of the Constitutional Court)

"The Constitutional Court decides:

on the conformity of laws with the Constitution;

on the conformity of laws and other regulations with ratified treaties and with the general principles of international law;

....

on constitutional complaints stemming from the violation of human rights and fundamental freedoms by individual acts; ..."

II. LEGISLATION AND CASE-LAW

A. Voting

1. Legalisation

38. The Elections Act (the National Assembly Elections Act) regulates elections to the National Assembly. Its provisions are also used, *mutatis mutandis*, with respect to European Parliament elections and public referendums. It was enacted in 1992. On 20 April 2017 it was amended by the 2017 Amendment, which was enacted following the Constitutional Court's 2014 decision (see paragraphs 43-45 below). Pursuant to the Elections Act there are eight electoral constituencies which are each further divided into eleven electoral districts. Elections are run by electoral bodies, that is by constituency election commissions (one for each electoral constituency), district election commissions (one for each electoral district) and election committees (one for each polling station), which each have

different responsibilities. The Elections Act provides that voters should normally exercise their right to vote at the polling station in the local area of their permanent residence. Such areas are determined by the district election commissions for each electoral district. The district election commissions also issue decisions appointing members of election committees which are responsible for practical tasks, such as registering the voters and handing out the ballot papers, and for ensuring that voting at the polling stations is carried out in accordance with law. The National Election Commission ensures the legitimacy of elections and the uniform application of the provisions of the Elections Act. It also co-ordinates and oversees the work of, *inter alia*, district election commissions.

39. The Elections Act and the Referendums Act (the Referendums and Popular Initiatives Act) provide that the right to vote in elections or referendums, respectively, should be exercised in person, freely and by secret ballot.

40. Under the Elections Act, if a voter has difficulties casting his or her vote owing to a physical disability or to illiteracy, he or she has the right to be accompanied by a person who will help him or her to complete or deposit his or her ballot paper. A decision thereon shall be taken by the election committee and shall be entered in the minutes (section 79). Voters who cannot go in person to the polling station for reasons of illness may vote in their homes before an election committee (section 83).

41. Until 31 January 2018 the Elections Act provided that each district commission should designate at least one polling station that would be accessible to people with disabilities in that electoral district. At that polling station, the district commission could also facilitate voting by way of specially adapted ballots and voting machines.

42. Since 1 February 2018, under the 2017 Amendment (see paragraph 38 above) all polling stations have had to be accessible to people with disabilities, while the possibility of voting by voting machine is no longer provided for (section 79a of the (amended) Elections Act). The 2017 Amendment introduced an additional voting option for people with disabilities, namely voting by post (as of 20 May 2017). Prior to the 2017 Amendment this option was limited to people residing in homes for the elderly and voters undergoing hospital treatment.

2. The Constitutional Court's 2014 decision

43. In decision no. U-I-156/11, Up-861/11 of 10 April 2014, the Constitutional Court assessed the compliance of the Elections Act with the Constitution, pursuant to a petition lodged by, *inter alios*, H. and the second applicant. It found that the relevant provision of that Act did not constitute an appropriate "accommodation" sufficient to enable people with disabilities to independently physically access polling stations in public buildings; that shortcoming was in breach of the right of people with

disabilities to non-discriminatory treatment (and thus constituted indirect discrimination) in respect of their right to vote. In particular, it found that not all polling stations were physically accessible to voters with disabilities, even though achieving such accessibility would not have entailed placing a disproportionate or unnecessary burden on the State. It changed its previously expressed view (given in respect of case no. U-I-25/10) to the effect that it sufficed for electoral bodies to inform the public of those polling stations that were physically accessible to people with disabilities. It now required all polling stations to be accessible.

44. With regard to the selection of polling stations that enabled the possibility to vote with the help of specially adapted ballots and voting machines, the Constitutional Court found that that had been left entirely to the discretion of district election commissions, which was unconstitutional. While all polling stations had been equipped with a tactile voting device for blind people, the same was not true for voting machines. The Constitutional Court, however, acknowledged that the provision of voting machines was a costly project and noted that that was a factor that could be taken into account by the legislature when formulating new regulatory measures in this field. It also noted that in the previous round of elections fifty-five polling stations had been equipped with voting machines. It left open the question of whether any new regulation that would lead to fewer, equal or more voting machines would be compatible with the Constitution.

45. The Constitutional Court ordered that the incompatibility with the Constitution be remedied within two years of the publication of its decision. It furthermore addressed the constitutional complaint lodged simultaneously by H. It found that as the elections concerned had already been completed, a favourable outcome could have not improved H.'s legal position. In the court's view, H. had achieved the aim that he had pursued through the constitutional complaint, as the petition that he had simultaneously lodged had been successful and he had therefore succeeded in improving his situation for the next elections. He thus had no legal interest in a decision on the constitutional complaint.

B. Remedies

1. System of appeal under the electoral law

46. Under the Elections Act, each voter may lodge a complaint with his or her constituency election commission (see paragraph 38 above) regarding any irregularities in the work of the election committee or of the district election commission. A complaint may be lodged within three days of the election day in question. The constituency election commission must decide on such a complaint within forty-eight hours and then (if necessary) take remedial measures (for example, annul and re-run the voting within the electoral district in question or determine again the results) only if

complained of irregularities in respect of the voting or the work of the election bodies considerably affected or could affect the results of the election. Similar provisions are contained in the Referendums Act, under which voters may lodge complaints with the National Commission. The latter may take remedial measures only if irregularities influenced or could have influenced the outcome of the referendum in question.

47. The Elections Act and the Referendums Act differ as regards the remedies that they respectively provide in respect of a decision issued by an electoral body dismissing a complaint lodged by a voter. Under the Referendums Act, a voter may lodge an appeal with the Administrative Court, which must decide on such an appeal within forty-eight hours. However, no such appeal is provided for under the Elections Act, and according to a Constitutional Court decision (U-I-100/13, Up-307/12) of 10 April 2014, the only court with the authority to decide such cases is the Constitutional Court. The decisive question in proceedings under any of the above-mentioned Acts is whether the alleged irregularities considerably affected or could have affected the results of the voting; only when this is so can such complaints be upheld (ibid.; see also Constitutional Court decision U-I-191/17 of 25 January 2018).

2. Remedies concerning violations of human rights

(a) The Administrative Disputes Act

48. In an administrative dispute, the court concerned shall rule on the legality of (i) final administrative acts that encroach on the legal status of the plaintiff and (ii) the legality of individual acts and actions interfering with human rights and fundamental freedoms, unless a different form of judicial protection is ensured. In cases of an alleged infringement of human rights (section 4), the plaintiff may lodge an application seeking (i) the annulment, issuance or modification of the act in question, (ii) official recognition that there has been a violation of human rights, (iii) the prohibition of the continuation of the interference, and (iv) the elimination of the consequences of the interference (section 33). Such an application must be lodged within thirty days of the delivery of the act in question or within thirty days of the relevant interference with human rights.

49. By decision no. Uv 9/2014 of 22 July 2014 the Supreme Court rejected an appeal against a certain decision adopted by a district election commission. It found that, given the fact that the election in question had already taken place, it would be possible to seek a finding of a violation of human rights under section 33 of the Administrative Disputes Act.

50. The applicants submitted decisions from 2010, 2011 and 2013 by which the Administrative Court had rejected – on the merits – actions relating to access to voting brought by individuals with disabilities; in at

least one of those cases, the Administrative Court's decision had been upheld by the Supreme Court.

(b) The Obligations Code

51. Monetary compensation for non-pecuniary damage may be sought only in respect of cases specified in the Obligations Code. In judgment no. II Ips 99/2013 of 5 November 2015 concerning an instance of alleged discrimination against a voter with a disability, the Supreme Court noted that the right to vote could not be considered to constitute a "personality right" and that non-pecuniary damages could therefore not be awarded under the Obligations Code. An aggrieved party could, however, bring an action seeking a finding of a violation of human rights under section 4 of the Administrative Disputes Act (see paragraph 48 above).

(c) The Protection against Discrimination Act

52. The Protection against Discrimination Act entered into force on 24 May 2016. It established a special body for overseeing protection against discrimination – namely the Advocate of the Principle of Equality ("the Advocate"). The Protection against Discrimination Act defines what is meant by the term "discrimination", and sets out measures to promote equal treatment, the procedure to be followed when lodging a complaint with the Advocate, and judicial remedies that may be sought. Under section 39, a claimant may bring an action seeking an end to discrimination, or compensation for discrimination, or the publication of the ruling in the media. Compensation should be paid by the perpetrator of the discrimination in question in an amount ranging from 500 to 5,000 euros. The duration of the discrimination in question, the severity of the discrimination and other factors shall be considered when determining the amount of compensation to be awarded. Provisions of the Act that govern civil procedure shall apply to the adjudication of an action lodged under section 39 of the Protection against Discrimination Act.

53. The Protection against Discrimination Act replaced the Implementation of the Principle of Equal Treatment Act, which had been in force since 2004. Under the latter, people who had suffered discrimination had the right to compensation according to the general principles of civil law (that is to say only with respect to any pecuniary damage suffered, see paragraph 51 above).

RELEVANT INTERNATIONAL MATERIAL

I. UNITED NATIONS CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITIES (CRPD) AND RELATED PRACTICE

54. The relevant parts of the CRPD are set out in *Guberina v. Croatia*, no. 23682/13, § 34, 22 March 2016. Furthermore, the following passages from the CRPD, ratified by Slovenia on 24 April 2008, are particularly relevant to the present case:

Article 29 - Participation in political and public life

"States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to:

a. Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, *inter alia*, by:

i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice; ..."

55. The CRPD Committee's General Comment No. 2 (adopted on 11 April 2014), concerning Article 9 of the CPRD, reads, in so far as relevant, as follows:

"14. .... The right to access for persons with disabilities is ensured through strict implementation of accessibility standards. Barriers to access to existing objects, facilities, goods and services aimed at or open to the public shall be removed gradually in a systematic and, more importantly, continuously monitored manner, with the aim of achieving full accessibility.

...

23. Since accessibility is a precondition for persons with disabilities to live independently, as provided for in article 19 of the Convention, and to participate fully and equally in society, denial of access to the physical environment, transportation, information and communication technologies, and facilities and services open to the public should be viewed in the context of discrimination. ...

...

25. Accessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an *ex ante* duty. States parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service. ... Accessibility standards must be

broad and standardized. In the case of individuals who have rare impairments that were not taken into account when the accessibility standards were developed or who do not use the modes, methods or means offered to achieve accessibility (not reading Braille, for example), even the application of accessibility standards may not be sufficient to ensure them access. In such cases, reasonable accommodation may apply. ... The obligation to implement accessibility is unconditional, i.e. the entity obliged to provide accessibility may not excuse the omission to do so by referring to the burden of providing access for persons with disabilities. The duty of reasonable accommodation, contrarily, exists only if implementation constitutes no undue burden on the entity.

26. The duty to provide reasonable accommodation is an *ex nunc* duty, which means that it is enforceable from the moment an individual with an impairment needs it in a given situation ... Here, accessibility standards can be an indicator, but may not be taken as prescriptive. Reasonable accommodation can be used as a means of ensuring accessibility for an individual with a disability in a particular situation. ...”

56. The relevant passages from the CRPD Committee’s General Comment No. 6 (adopted on 26 April 2018) on equality and non-discrimination read as follows:

“42. Because the gradual realization of accessibility in the built environment, public transportation and information and communication services may take time, reasonable accommodation may be used as a means to provide access to an individual in the meantime, as it is an immediate duty. ...

...

70. Exclusion from electoral processes and other forms of participation in political life are frequent examples of disability-based discrimination. They are often closely linked to denial or restriction of legal capacity. States parties should aim to:

...

(b) Ensure that the electoral process is accessible to all persons with disabilities, including before, during and after elections;

(c) Provide reasonable accommodation to individual persons with disabilities and support measures based on the individual requirements of persons with disabilities to participate in political and public life; ...”

57. Under the Optional Protocol to the CRPD, the CRPD Committee examined communication no. 19/2014, submitted by Fiona Given against Australia, in which the author, who suffered from cerebral palsy, complained that during federal elections in 2013 she had been given no choice but to vote with the aid of her attendant. She had been unable to use electronically assisted voting, which was normally available to people with visual impairments, and had been denied assistance by the electoral officer. On 16 February 2018 the CRPD Committee found that none of the options available to the author had enabled her to exercise her right to vote in the way that she had wanted – namely, without having to reveal her political choice to the person accompanying her. The CRPD Committee furthermore noted that access to the use of an electronic voting system would have enabled her to cast an independent and secret ballot without having to reveal

her political choice to anyone, on an equal basis with others. It went on to find as follows:

> "8.9 In the present case, the [CRPD Committee] also recalls that the electronic voting option has been widely used for persons with visual impairments in New South Wales State elections since 2011. It also notes that the State party has not provided any information that could justify the claim that the use of such an electronic voting option would have constituted a disproportionate burden, so as to prevent its use in the 2013 federal election for the author and for all persons requiring such accommodation. The [CRPD Committee] also recalls that article 5 enshrines the principle of equal protection of all persons before and under the law. States parties must prohibit all disability-based discrimination and provide persons with disabilities effective and equal protection against discrimination on all grounds. [reference omitted] This conventional obligation implies that States parties must ensure the realization of the rights under the Convention for all persons with disabilities, and refrain from establishing discriminatory legislation and practice that can result in factors of discrimination depending on the type of impairment.
>
> 8.10 The [CRPD Committee] therefore finds that the failure to provide the author with access to an electronic voting platform already available in the State party, without providing her with an alternative that would have enabled her to cast her vote without having to reveal her voting intention to another person, resulted in a denial of her rights under article 29 (a) (i) and (ii), read alone and in conjunction with articles 5 (2), 4 (1) (a), (b), (d), (e) and (g) and 9 (1) and (2) (g) of the Convention."

II. RELEVANT COUNCIL OF EUROPE DOCUMENTS

58. The Revised Interpretative Declaration to the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections ("the Revised Interpretative Declaration") was adopted by the Council for Democratic Elections at its 39th meeting (Venice, 15 December 2011) and by the Venice Commission at its 89th plenary session (Venice, 16-17 December 2011). It reads, in so far as relevant, as follows:

> "II. THE FOLLOWING COMPLETES THE PRINCIPLES STATED IN THE CODE
>
> **1. Universal suffrage**
>
> 2. Universal suffrage is a fundamental principle of the European Electoral Heritage. People with disabilities may not be discriminated against in this regard, in conformity with Article 29 of the Convention of the United Nations on the Rights of Persons with Disabilities and the [case-law] of the European Court of Human Rights.
>
> 3. Voting procedures and facilities should be accessible to people with disabilities so that they are able to exercise their democratic rights, and allow, where necessary, the provision of assistance in voting, with respect to the principle that voting must be individual (the Code, item I.4.b).
>
> 4. The application of Universal Design principles and direct and/or indirect participation of the user in all design stages are effective means for improving the accessibility of polling stations and election procedures to cast one's vote and for getting access to information on elections ...
>
> ...

4. Secret suffrage

7. The right of people with disabilities to vote by secret ballot should be protected, *inter alia*, by "guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing them to use assistance technologies and/or to be assisted in voting by a person of their own choice" in conditions which ensure that the chosen person does not exercise undue influence."

59. In Resolution 2155 (2017), adopted on 10 March 2017 and entitled "The political rights of persons with disabilities: a democratic issue", the Parliamentary Assembly of the Council of Europe called on member States to, *inter alia*:

4.4. with regard to accessibility of polling stations, ...:

7.4.1. ensure physical accessibility of public buildings, including polling stations, ... and guarantee that at least one polling station in every election district provides full accessibility;

...

7.4.3. provide ballot papers in accessible formats and tactile voting devices for blind people in at least one polling station in every election district;

...

7.5. with regard to assistance with voting and to remote and alternative voting:

7.5.1. provide, when requested, assistance with voting *via* supported decision making, and respect for the voter's free will;

...

7.5.4. set up mobile voting units and propose, when possible, electronic voting for cases where persons with disabilities are not in a position to go to a polling station; ..."

III. EUROPEAN UNION – EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

60. Relevant comparative information concerning access to voting in the EU member States may be found in the information report entitled "Real rights of people with disabilities to vote in European Parliament elections" issued in March 2019 by the Section for Employment, Social Affairs and Citizenship of the European Economic and Social Committee (EESC). According to the report, eleven EU countries apply the general principle that all polling stations have to be adapted to suit the needs of persons with disabilities. However, the report finds that this accessibility is understood rather narrowly in practice – only as a lack of physical barriers to wheelchair users arriving at a polling station accompanied by other people who might, if necessary, help to push a wheelchair (6.2.3). Six EU countries have no rules on adapting polling stations to the needs of people with disabilities (ibid.) and no EU member State has implemented comprehensive solutions (6.2.11). Some of the most frequent difficulties

include: "excessively small voting booths, major difficulties in using them by wheelchair users ..., [a] lack of choice [regarding] how to fill out the ballot paper (sitting or standing), overly small tables to fill in ballot papers ..., [and the] location of the slot in the ballot box in a way that [prevents] some voters with disabilities from independently inserting their ballot" (6.2.13). As regards voting with the assistance of a freely chosen person, the report notes that in most EU member States, such assistance is permitted, but that in only some of them can a member of an electoral commission be designated to undertake the role of an assistant. (6.2.6).

61. As regards voting at a polling station, the report makes the following comments (6.2.18):

> "a) Despite the existing rules, the vast majority of polling stations in the EU are not fully or generally adapted to the needs of persons with various types of disabilities and this cannot be corrected quickly. Therefore, the best remedy to this situation for the time being is to allow voters with disabilities to change polling stations, if the polling station has been designated in connection with the place of residence. The administrative procedure leading to such a change should be simple and quick.
>
> b) All voters with disabilities should be free to choose the person who will assist them during elections at the polling station. The additional conditions for such assistants in many countries do not seem warranted.
>
> ...
>
> d) It is of the utmost importance to draw up very detailed principles (in the form of legal rules or instructions for local authorities and electoral commissions) specifying the electoral commissions' facilities and how their work is organised. Those rules should specify, among other things, the structure of areas in which people may move around unhindered; the size, location, and facilities of voting booths; the accessibility of the ballot box; as well as parking arrangements and access to the polling station."

62. The report considers voting by mobile ballot box to be an effective way to enable persons with disabilities to take part in voting and notes that that option could be combined with postal voting (6.6.8). Moreover, until the accessibility of polling stations is improved, it suggests as a provisional solution the taking of ballot papers and the placing of a small additional ballot box in front of the polling station so that voters may cast their vote there (ibid.). The report also notes the fact that electronic voting using stationary devices in polling stations does not render it substantially easier for people with disabilities to participate in elections. In order to change that, it declares it necessary to put in place technical arrangements allowing people with various disabilities to operate such devices independently and to ensure genuine privacy and secrecy for voters (6.8.4).

IV. ORGANISATION FOR SECURITY AND CO-OPERATION IN EUROPE, OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (OSCE/ODIHR)

63. ODIHR found in its Election Assessment Mission Final Report on 2011 early parliamentary elections in Slovenia, published on 7 February 2012, that although Slovenian law provided for measures to enable the participation of voters with disabilities, access to polling stations remained an issue. As regards the secrecy of the voting procedure, ODIHR noted that votes cast using voting machines had a different format from other ballots and were often low in number, thereby potentially compromising the secrecy of the vote. In its Election Assessment Mission Final Report on early parliamentary elections held in 2018 in Slovenia, which was published on 12 September 2018, ODIHR noted that almost full compliance had been achieved in rendering polling stations physically accessible for voters with disabilities. It also suggested that e-voting could provide a viable alternative method of allowing voters with disabilities to exercise their suffrage rights without assistance.

THE LAW

I. JOINDER OF THE APPLICATIONS

64. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. *LOCUS STANDI* WITH RESPECT TO APPLICATION NO. 34591/19

65. The Court notes that the first applicant died soon after lodging the application with the Court and that his daughters, Nataša Toplak and Renata Toplak, expressed the wish to continue the proceedings before the Court in his stead. They submitted a copy of the relevant inheritance decision, which shows that they are the sole heirs of the first applicant. The Court, having regard to its relevant case-law (see, for instance, *Jama v. Slovenia*, no. 48163/08, § 28, 19 July 2012), accepts that the aforementioned heirs may pursue the application initially lodged by the first applicant. Any submissions made by them will be referred to as "the first applicant's submissions".

III. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

66. The Government pointed out that the applicants had not raised the issue of the non-availability of voting machines in the applications that they had lodged with the Court and had not submitted with their applications any

documents related to the constitutional review concerning, *inter alia*, the use of voting machines (see paragraph 31 above).

67. The Government furthermore argued that the applicants had in their remedies cited the need for polling stations, voting booths, tables and ballot boxes to be physically accessible, but had provided no or insufficient information regarding their actual participation in the 2015 Referendum. In his constitutional appeal, the first applicant had not detailed the circumstances of his participation in the 2015 Referendum. The second applicant had alleged in his constitutional appeal that the polling station had been inaccessible, even though he had previously acknowledged in his appeal to the Supreme Court that he had, in fact, voted.

68. The Government also asserted that the applicants had failed to exhaust the available domestic remedies because they had not brought an action under section 4 of the Administrative Disputes Act seeking a finding of a violation of human rights (see paragraph 48 above). Moreover, they had not sought remedies under the Elections Act and the Referendums Act (see paragraphs 46-47 above) and had not availed themselves of the remedy available under section 39 of the Protection against Discrimination Act (see paragraph 52 above) with respect to the alleged discrimination that they had suffered during the 2019 EP Elections.

69. The Government also alleged that the applicants had failed to comply with the six-month time-limit with respect to their complaints concerning the 2015 Referendum. While the applicants had lodged their application within six months of the dismissal of their constitutional complaints, the actions that they had brought in the Administrative Court had been premature (they had brought them before, instead of after, the referendum).

70. The applicants argued that they had used all the available remedies, including lodging a constitutional complaint and lodging a petition for constitutional review. They contested the Government's argument that the present case did not concern voting machines and pointed out that they had argued before the domestic authorities that polling stations should be fully accessible (which would necessitate the facilitating of access to all elements of the voting process). In the proceedings before the Constitutional Court they had relied on the CRPD Committee's decision of 2018 (see paragraph 57 above), which concerned also voting machines.

71. The Court observes that in their respective application forms the applicants did not explicitly raise the issue of the availability of voting machines. However, the alleged lack of accessibility comprised various aspects, and there is no reason why the lack of voting machines should not be considered among them. The Court notes in this regard that with respect to the 2019 EP Elections the applicants alleged, *inter alia*, that "no accessible voting methods or equipment [had been] available" (see paragraph 29 above). They referred to the standards of accessibility set out

in the relevant international material, with which in their view the Slovenian authorities should have been familiar. The Court also finds it important that one set of proceedings before the Constitutional Court, in which both applicants participated, concerned precisely this issue. It is true that the applicants did not submit information concerning those proceedings in their applications, but they were bound up with the first applicant's constitutional complaint (see paragraphs 15 and 31 above) and at the time at which the applications were lodged the constitutional review was still pending. The constitutional review proceedings ended with the Constitutional Court's decision (see paragraphs 33 to 36 above), which was issued after the applications had been lodged with the Court. The Court lastly notes that the Government extensively commented on whether voting machines were required, especially after the delivery of the aforementioned Constitutional Court's decision. Hence, the first preliminary objection is dismissed (see paragraph 66 above).

72. As regards the precise circumstances concerning the applicants' participation in the 2015 Referendum and in the 2019 EP Elections, the Court cannot lose sight, firstly, of the fact that their original complaints concerned their alleged inability to vote on an equal basis with others over a long period of time in several elections and referendums, but that the Government were given notice only of the complaints concerning the 2015 Referendum and the EP 2019 Elections (the remaining complaints having been rejected as inadmissible at an earlier stage of the proceedings). Secondly, as regards the facts submitted in the domestic proceedings, the Court observes that the applicants brought actions prior to the 2015 Referendum and that their arguments were largely based on their previous experiences. Having said that, the uncertainties regarding certain factual issues will be addressed when the applicants' complaints are examined on the merits. This preliminary objection should thus also be dismissed.

73. As regards the Government's objection concerning compliance with the six-month time-limit (see paragraphs 69 above), the Court notes that the applicants lodged their applications with the Court within six months of the date on which they had received the decisions of the Constitutional Court dismissing their constitutional complaints (see paragraphs 16 and 24 above). The Constitutional Court decisions relate to the proceedings that the applicants had initially instituted before the Administrative Court with a view to seeking adjustments of the polling stations with respect to the upcoming 2015 Referendum, as well as any future elections and referendums (see paragraphs 11 and 19 above). Even though these proceedings proved to be incapable of offering any redress, in view of the Supreme Court's position (see paragraphs 14 and 22 above), it has not been demonstrated by the Government that they could be regarded as constituting inappropriate or misconceived avenues which could be considered as bound to fail from the outset and hence should not be taken into account for the

calculation of the six-month period (see, for example, *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, § 138, 19 December 2017; also contrast *Musayeva and Others v. Russia* (dec.), no. 74239/01, 1 June 2006, and *Rezgui v. France* (dec.), no. 49859/99, ECHR 2000-XI). In this respect, the Court notes that the Constitutional Court did not dismiss the applicants' constitutional complaints against the Supreme Court and Administrative Court decisions, in which they had complained about essentially the same issues as those being examined by the Court (see paragraphs 15 and 23 above), on the grounds that the available remedies had not been properly exhausted (see paragraphs 15 and 23 above). It thus rejects this objection of the Government.

74. With regard to the Government's objections concerning the exhaustion of certain domestic remedies (see paragraphs 68 above) the Court notes that they are closely linked and should thus be joined to the examination of the merits of the complaint under Article 13, taken together with other cited provisions.

IV. CHARACTERISATION OF THE COMPLAINTS AND ORDER OF EXAMINATION

75. The Court notes that the applicants complained under Article 3 of Protocol No. 1 and under Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1. They also complained under Article 1 of Protocol No. 12. Furthermore, they cited Article 13 of the Convention. Being the master of characterisation to be given in law to the facts of the case (see *Radomilja and others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018), the Court considers that in so far as they relate to the 2015 Referendum the applicants' complaints should be examined from the standpoint of Article 1 of Protocol No. 12 – both alone and in conjunction with Article 13 of the Convention. In respect of the 2019 EP Elections, the complaints should be examined under Article 14 of the Convention, in conjunction with Article 3 of Protocol No. 1, and from the standpoint of these two provisions taken together with Article 13 of the Convention.

76. The Court furthermore notes that when considering whether there has been a violation of the right to an effective remedy in respect of a violation of a substantive right guaranteed by the Convention, the Court's normal practice is to consider first whether there has been a violation of the substantive right relied upon and then to consider whether there has been a violation of Article 13. However, having considered the applicants' submissions and in view of the Court's decision to join the Government's objection regarding the exhaustion of domestic remedies to the merits of the complaint under Article 13 (see paragraph 74 above), the Court considers

that it should examine first whether there has been a violation of Article 13, read in conjunction with the other provisions relied on by the applicants.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION, TAKEN TOGETHER WITH ARTICLE 1 OF PROTOCOL No. 12 TO THE CONVENTION (AS REGARDS THE 2015 REFERENDUM) AND WITH ARTICLE 14 OF THE CONVENTION, IN CONJUCTION WITH ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION (AS REGARDS THE 2019 EP ELECTIONS)

77. The applicants complained of the lack of effective judicial means by which they could have requested an accessible polling station in advance. They furthermore complained of the lack of any effective remedy by which to claim compensation for being discriminated against in exercising their right to vote in elections or referendums. The relevant provisions (see paragraph 75 above) read as follows:

Article 13 (right to an effective remedy)

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by people acting in an official capacity."

Article 14 (prohibition of discrimination)

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Article 3 of Protocol No. 1 (right to free elections)

"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."

Article 1 of Protocol No. 12 (General prohibition of discrimination)

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

A. Admissibility

78. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the

Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see *Kudła v. Poland* [GC], no. 30210/96, § 157, ECHR 2000-XI).

79. Since Article 13 has no independent existence but merely complements the other substantive clauses of the Convention and its Protocols (see *Zavoloka v. Latvia*, no. 58447/00, § 35, 7 July 2009, and *DEBÚT Zrt. and Others v. Hungary* (dec.), no. 24851/10, 20 November 2012), the Court will first proceed to ascertain whether the other provisions cited together with Article 13 are applicable in the present case.

80. The Court notes at the outset that both applicants complained that they had been hindered in the enjoyment of their rights because of their disability, which falls under "any other status" as a prohibited grounds for discrimination (see *Çam v. Turkey*, no. 51500/08, § 55, 23 February 2016, and *Guberina v. Croatia*, no. 23682/13, § 79, 22 March 2016). It furthermore notes that as regards the 2019 EP Elections it has not been disputed that Article 3 of Protocol No. 1 applied, and the Court sees no reason to hold otherwise (see, for instance, *Matthews v. the United Kingdom* [GC], no. 24833/94, §§ 45-54 , ECHR 1999-I).

81. As regards the 2015 Referendum the Court notes that while Article 14 of the Convention prohibits discrimination in the enjoyment of "the rights and freedoms set forth in [the] Convention", Article 1 of Protocol No. 12 extends the scope of protection to "any right set forth by law". It thus introduces a general prohibition of discrimination (see *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 53, ECHR 2009). It has not been disputed in the present case that the applicants had a right to vote in referendums (see also paragraph 37 above), including the one held in 2015. Having regard to the fact that the disability falls within "any other status" as a prohibited ground of discrimination (see paragraph 80 above), Article 1 of Protocol No. 12 is applicable to the complaints concerning the applicants' participation in the 2015 Referendum.

82. The Court also finds that the applicants' complaints under the substantive provisions are "arguable" for the purposes of Article 13. It therefore concludes that, not being inadmissible on any other grounds listed in Article 35 of the Convention, this part of the applications must be declared admissible.

B. Merits

1. The submissions by the parties

83. The applicants submitted that they, together with other voters with disabilities, had attempted to avail themselves of all the available (election and post-election) remedies repeatedly and over a long period of time but

had always been unsuccessful. They pointed out that appeals under the electoral laws (see paragraphs 46-47 above) could not be effective as one person's vote could not affect the overall result. They had not availed themselves of any of the available domestic remedies following the 2019 EP Elections as it had by then been clear that none of them would be effective. The applicants furthermore argued that they should have had at their disposal a remedy allowing them to request an accessible polling station ahead of the elections and the referendums. The applicants criticised the Constitutional Court's view that complaints relating to the voting process should be rejected once the elections in question were over (see paragraph 45 above). They also argued that the Supreme Court's position in respect of their cases constituted a change in the case-law that they could not have foreseen. With respect to the Protection against Discrimination Act, the applicants argued that that Act did not constitute an effective way to ensure that polling stations were accessible.

84. The Government acknowledged that the applicants could not have claimed compensation with respect to the alleged violations that had occurred during the 2015 Referendum because neither the Administrative Disputes Act nor the Obligations Code provided for the possibility of obtaining monetary redress. The applicants could have obtained a finding of a violation, which, in the Government's view, would have sufficed. They referred to cases in which the Court had ruled that the finding of a violation had been sufficient, such as *Kulinski and Sabev v. Bulgaria*, no. 63849/09, 21 July 2016, and *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, 4 July 2013. After the 2019 EP Elections, the applicants could have brought an action under section 4 of the Administrative Disputes Act and sought a remedy under section 39 of the Protection against Discrimination Act, which would have allowed them to seek monetary compensation for the alleged discrimination.

85. The Government also submitted that there were no preventive remedies as regards the accessibility of polling stations because the domestic authorities were in any event bound by law to make polling stations accessible to people with disabilities.

86. The office of the Advocate for the Principle of Equality (see paragraph 52 above), acting as a third party in the proceedings, argued that as regards the claim under section 39 of the Protection against Discrimination Act (see paragraph 52 above), no case-law had been formulated thus far on the basis of that provision and that in point of fact the first and only legal action, which had been brought by the Advocate in 2019, was still pending before the domestic court. The third party considered this remedy to present a degree of uncertainty for the plaintiffs.

2. The Court's assessment

87. As the Court has stated on many occasions, the Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under Article 13 of the Convention. The scope of their obligations under Article 13 also varies, depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law (see *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 107, ECHR 2001-V (extracts)).

(a) The remedies with respect to the 2015 Referendum

88. According to the Supreme Court (see paragraphs 14 and 22 above) and the Government (see paragraph 68 above), the applicants had at their disposal a remedy under the Referendums Act. However, it is clear from the relevant domestic law and practice that this remedy could have had an effect only if the grounds for complaint had potentially affected the 2015 Referendum's outcome (see paragraphs 46-47 above). It was not meant to be and was not capable of addressing the kind of individual complaints raised by the applicants.

89. The Government furthermore argued that the applicants had had at their disposal an effective remedy in the form of bringing an action under section 4 of the Administrative Disputes Act (see paragraphs 48-50 above), but had failed to use it properly – that is to say after the 2015 Referendum (see paragraphs 68, 69 and 84 above). The Court reiterates in this regard that remedies must be effective in the sense that they could have prevented the alleged violations occurring or continuing or could have afforded the applicants appropriate redress for any violation that had already occurred (see, for instance, *Kudła*, cited above, § 158, and *Jaremowicz v. Poland*, no. 24023/03, § 70, 5 January 2010). The applicants clearly intended to use the remedies with the aim of ensuring the accessibility of their local polling station in advance. The Government, however, submitted that there were no preventive remedies as regards the accessibility of polling stations (see paragraph 85 above) and that the applicants should instead have sought the finding of a violation of their human rights under section 4 of the Administrative Disputes Act (see paragraph 68 above); this seems to have been suggested also by the Supreme Court (see paragraph 14 above). It has been acknowledged by the Government that neither the action under section 4 of the Administrative Disputes Act nor any other remedy would have enabled the applicants to obtain any form of compensation for the violation which had allegedly occurred (see paragraphs 48 and 84 above).

90. The Court takes note that an action under section 4 of the Administrative Disputes Act was, pursuant to the Supreme Court's view (see paragraphs 14 and 22 above), not intended to prevent a possible

violation of the applicants' rights. Taking into account the aforementioned absence of any legal remedy with a preventive effect, the Court further considers that an action of which the sole purpose was to obtain a finding of a violation without the possibility to seek redress would constitute an inadequate remedy. The fact that the Court in some cases concerning the right to vote has awarded no monetary compensation (see paragraph 84 above) cannot alter this finding. The Court would emphasise that in the present case it is not confronted with a domestic decision by which no compensation was awarded in view of the circumstances of the case, but with a domestic court that lacks any power to award appropriate redress.

91. Therefore, as regards the 2015 Referendum, the applicants did not have at their disposal an effective remedy; there has thus been a violation of Article 13, taken together with Article 1 of Protocol No. 12 to the Convention.

(b) The remedies with respect to the 2019 EP Elections

92. As regards an action brought under section 4 of the Administrative Disputes Act, the Court has already found that it would not have been capable of providing appropriate redress, as required by Article 13 of the Convention (see paragraphs 89 and 90 above). As to a remedy that might be sought under the Elections Act, it finds that, like the remedy that might be sought under the Referendums Act (see paragraph 88 above), such a remedy was neither meant to address nor was capable of addressing the complaints raised by the applicants – that is to say complaints that did not appear to be capable of affecting the outcome of the elections (see paragraphs 46-47 above). With respect to the remaining possible remedies, the Court finds that it is necessary to distinguish between the two applicants.

(i) The first applicant

93. The first applicant did not vote in the 2019 EP Elections because he could have done so only by using a voting machine. Such machines were, pursuant to the 2017 Amendment, no longer available (see paragraphs 38 and 42 above). The issue at stake was therefore not one of any reasonable accommodation that could have been provided at the polling station but one of an instance of alleged discrimination under the relevant legislation. The Court notes that this issue was considered during the proceedings for the review of constitutionality before the Constitutional Court (see paragraph 37 above), in which the first applicant took part (see paragraphs 16 and 31 above). The Constitutional Court, having regard to the arguments of those involved, as well as the relevant international material, thoroughly examined whether the removal of the voting machines had been in compliance with the fundamental rights of voters with disabilities (see paragraphs 33-36 above). It is true that it did not reach a conclusion

favourable to the first applicant, but this fact alone does not mean that the remedy was ineffective (see, *mutatis mutandis*, *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, § 50, Series A no. 20). There has therefore been no violation of Article 13 of the Convention with respect to the first applicant's complaint relating to the 2019 EP Elections.

(ii) The second applicant

94. The second applicant voted but complained that he had been unable to do so on an equal basis with others owing to practical obstacles that he had encountered at his polling station and the failure to reasonably accommodate his needs. The Court observes that it was open to the second applicant to express any concerns that he might have had regarding the accommodation of his needs to the relevant electoral bodies (see paragraphs 13 and 20 above), which ahead of the 2015 Referendum had constructively responded to his requests (see paragraph 121 below). Had he considered that he had suffered discrimination in exercising his right to vote he could, under section 39 of the Protection Against Discrimination Act (which came into force in 2016), have lodged a claim for compensation. Although no case-law may be so far established in this regard (see paragraph 86 above), the provisions of section 39 have been specifically designed to address discrimination and do not raise any unambiguity that would – prima facie – call the effectiveness of this remedy into question (see, for instance, *Charzyński v. Poland* (dec.), no. 15212/03, § 41, 1 March 2005).

95. It is true that the second applicant could not have sought – by way of an action brought under section 4 of the Administrative Act or by way of the remedies provided under the Referendums Act – that particular adjustments be made at his local polling station (see paragraphs 88-90 and 92 above). However, under Article 13 of the Convention, the national authorities enjoy a certain discretion as to the manner in which they conform to their Convention obligations (see paragraph 87 above), and the Court finds that, given the circumstances of the case, a remedy capable of affording appropriate redress in the form of compensation would satisfy the criteria of Article 13.

96. Accordingly, the second applicant had at his disposal an effective remedy, so there has been no violation of Article 13 on this account.

VI. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 12 TO THE CONVENTION (AS REGARDS THE 2015 REFERENDUM) AND THE ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, IN CONJUCTION WITH ARTICLE 3 OF PROTOCOL No. 1 TO THE CONVENTION (AS REGARDS THE 2019 EP ELECTIONS)

97. The applicants, whose mobility was impaired owing to disability and who used wheelchairs, complained of a violation of Article 1 of Protocol No. 12 with respect to their alleged lack of access to the voting procedure during the 2015 Referendum. They furthermore complained of a violation of Article 14, taken together with Article 3 of Protocol No. 1, with respect to the 2019 EP Elections. Those provisions have already been cited above (see paragraph 77 above).

A. Admissibility

98. The Court has found that the second applicant had an effective remedy at his disposal as regards the 2019 EP Elections. It thus upholds the Government's preliminary objection concerning the non-exhaustion of domestic remedies in this respect (see paragraph 96 above). This part of the second applicant's application is therefore inadmissible under Article 35 § 1 and 4 of the Convention.

99. As regards the remaining complaints, the Court notes that it has found that the applicants did not have at their disposal an effective remedy with respect to their complaint concerning the 2015 Referendum (see paragraph 91 above). The Government's preliminary objection concerning the non-exhaustion of domestic remedies in this respect should therefore be dismissed. As regards the first applicant's complaint in relation to the 2019 EP Election, the Government argued that he should have used the compensatory remedy under the Prohibition of Discrimination Act (see paragraphs 52 and 68 above). The Court recalls that, where several remedies are available, the applicant is not required to pursue more than one and it is normally that individual's choice as to which (see, *mutatis mutandis*, *Karakó v. Hungary*, no. 39311/05, § 14, 28 April 2009). It notes that the first applicant had availed himself of the proceedings for the review of constitutionality before the Constitutional Court (see paragraph 93 above). The Government did not provide any relevant arguments to the effect that he would have been required to exhaust an additional legal avenue in the form of a compensatory remedy (see paragraph 68 above). This objection of the Government should therefore likewise be dismissed.

100. The Court furthermore notes that the applicants' complaints concerning the 2015 Referendum and the first applicant's complaint concerning the 2019 EP Elections are neither manifestly ill-founded nor

inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The submissions by the parties

(a) The applicants

101. The applicants argued that "accessible" polling stations meant not only stations that had an accessible entrance but also an accessible path to the voting room, access to the voting booth in which they could vote privately, an accessible ballot paper and an accessible ballot box. They had requested in the proceedings initiated before the 2015 Referendum that their voting booths and tables be wheelchair-accessible, but that request had been ignored. The second applicant disputed the Government's assertion that his local polling station had been accessible and pointed out that the visit made by the district election commission in 2015 could not have ensured the accessibility of the interior of his polling station, as it had taken place three days before the referendum, and the voting equipment had not been there at the time of the visit.

102. The first applicant submitted that since 2018 he would need to use electronic equipment designated specifically for people with disabilities in order to vote by secret ballot and without discrimination. Such equipment had been available in Slovenia for many years and enabled blind people or persons who could not use their hands to vote independently. Its use had been cancelled altogether by the 2017 Amendment. The applicants hoped that the Constitutional Court would overturn the legislature's decision in that regard, because such equipment had been – in their view – declared necessary by the CRPD Committee (see paragraph 57 above).

103. The applicants seemed to argue that the only way to secure their right to vote by secret ballot and without discrimination was by means of a fully accessible polling station, at which assistive technology was also available. All other – alternative – solutions were unable to fully achieve this objective.

(b) The Government

104. As regards the 2015 Referendum the Government argued that both applicants had been provided with an accessible polling station. The applicants had also been allowed to benefit from the assistance of a person of their own choice during the voting process. The Government also explained that the records of the election committee were not available as they had been destroyed during floods in 2018. They pointed out that only after the Government had been given notice of the application had the first applicant explained that he had actually voted during the 2015 Referendum.

As regards his description of the events, the Government pointed out that the first applicant had himself acknowledged that he had been accompanied by several people. That could explain the alleged presence of many people inside the polling station during the time that he had been casting his vote. As regards the second applicant, the Government stressed that he had raised only the issue of the angle of inclination of the ramp.

105. As regards the 2019 EP Elections, the Government argued that the first applicant could have availed himself of the assistance of another person in order to mark and deposit the ballot paper, could have voted by post, or could have voted at home, in the presence of the election committee.

106. As regards the third parties' submissions, the Government pointed out that the Advocate himself acknowledged in his submissions that he had not examined any case concerning access to polling stations and had so far made no recommendations in this regard. Relying on the information supplied by Equinet (see paragraph 109 below), the Government pointed out that that fact, together with the information contained in the EESC's information report (see paragraphs 60-62 above), indicated that the applicants in the present case had in fact been in a better position than voters with disabilities in many other European countries. With respect to the submissions of the HPOD and the CDLP (see paragraph 107 below) the Government pointed out that the applicants' local polling stations had been accessible and that the election commissions had responded to the applicants' requests during the 2015 Referendum.

(c) Third parties

(i) The Harvard Law School Project on Disability (HPOD) and the Centre for Disability Law and Policy (the CDLP)

107. The HPOD and the CDLP invited the Court to hold that accessibility, including assistive technology and voting assistance, was a necessary element of the right to vote and the right to be free from discrimination. They relied on the CRPD and the CRPD Committee's comments and invited the Court to differentiate between the denial of reasonable "accommodation" and the denial of accessibility. They outlined the following obligations, which in their opinion arose from the CRPD: (i) the unconditional obligation to ensure accessible voting facilities and procedures to people with mobility impairment without such individuals having to request such facilities and procedures in advance, and irrespective of the costs; (ii) the obligation to ensure that assistance provided to voters with disabilities did not jeopardise the secrecy of the voting procedure; (iii) the additional positive obligation to provide reasonable accommodation to individual voters in relation to their specific needs and circumstances; (iv) the obligation to respect a voter's choice of voting assistant; (v) the obligation to actually prove (not merely allege) that a proposed accommodation was disproportionately burdensome.

(ii) Advocate of the Principle of Equality

108. The office of the Advocate for the Principle of Equality (see paragraph 52 above) referred to the CRPD's accessibility standards and invited the Court to consider whether the concept of "reasonable accommodation" was pertinent to the present cases. It explained that in Slovenia the number of polling stations was traditionally very high and that citizens could in practice cast their votes very close to their homes. For each election or referendum, polling stations were set up on an *ad hoc* basis, although in practice, often the same premises (such as schools, inns or fire brigade stations) were used. It furthermore explained that although the accessibility of polling stations had improved owing to changes in the relevant legislation, it remained unclear to election commissions what "accessibility" meant in technical terms. As regards voting from home, it pointed to the lack of any specific regulation of this voting method.

(iii) The European Network of Equality Bodies (Equinet)

109. Equinet submitted that the trends had been emerging from the international and regional instruments in favour of the right of people with disabilities to have access to fully and autonomously accessible polling stations. It noted that in practice access for people with disabilities to the electoral process remained inadequate, resulting in a significantly low participation in the electoral process of people with disabilities. Equinet stated that it had gathered its information from the national equality bodies of nineteen Council of Europe member States. In its opinion, the data showed a general move towards a formal recognition of the right of people with disabilities to vote but also an overall lack of supervision as to how measures aimed at ensuring accessibility were executed in practice.

2. The Court's assessment

(a) Relevant principles

110. The relevant principles concerning the right to vote have been set out in *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, §§ 56-62, ECHR 2005-IX.

111. As regards Article 14 of the Convention, the Court reiterates that "discrimination" means treating differently, without an objective and reasonable justification, people in relevantly similar situations, and that a difference in treatment is devoid of any "objective and reasonable justification" where it does not pursue a "legitimate aim" or there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see *Enver Şahin v. Turkey*, no. 23065/12, § 54, 30 January 2018). However, the Court considers that this is not the only facet of the prohibition of discrimination under Article 14. The right not to be discriminated against in the enjoyment of the

rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently people whose situations are significantly different (see *J.D. and A. v. the United Kingdom*, nos. 32949/17 and 34614/17, § 84, 24 October 2019 with further references, notably *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV). In this context, relevance is measured in relation to what is at stake, whereas a certain threshold is required in order for the Court to find that the difference in circumstances is significant. For this threshold to be reached, a measure must produce a particularly prejudicial impact on certain persons as a result of a protected ground, attaching to their situation and in light of the ground of discrimination invoked (see *Ádám and Others v. Romania*, nos. 81114/17 and 5 others, § 87, 13 October 2020, and *Napotnik v. Romania*, no. 33139/13, § 73, 20 October 2020). As the effective enjoyment of many of the Convention rights by people with disabilities may require the adoption of various positive measures by the relevant State authorities (see *Mółka v. Poland* (dec.), no. 56550/00, ECHR 2006-IV), the Court considers that the threshold of significance referred to above must likewise be attained when an applicant alleges existence of discrimination due to lack of positive measures by the respondent State.

112. The Court also notes that the Convention should, as far as possible, be interpreted in harmony with other rules of international law, of which it forms a part (see *Enver Şahin*, cited above, § 53). Therefore, the provisions regarding the rights of people with disabilities set out in the CRPD should, along with other relevant material (see paragraphs 54 to 62 above), be taken into consideration. The Court observes in this connection that in its General Comment No. 2 the CRPD Committee noted that the denial of access of persons with disabilities to, *inter alia*, facilities and services open to the public should be viewed within the context of discrimination (see paragraph 55 above).

113. It is furthermore reiterated that the States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 76, ECHR 2013). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved (see *Enver Şahin*, cited above, § 55, and *Glor v. Switzerland*, no. 13444/04, § 75, ECHR 2009).

114. In previous cases concerning the rights of people with disabilities, the Court, referring to the CRPD, has found that Article 14 of the Convention has to be read in the light of the requirements of those texts regarding reasonable accommodation – understood as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case" – which people with

disabilities are entitled to expect in order to ensure "the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Article 2 of the CRPD). Such reasonable accommodation helps to correct factual inequalities which are unjustified and which therefore amount to discrimination (see *Çam*, cited above, § 65). The Court finds that these considerations apply equally to the participation of people with disabilities in political life. It notes in this regard that Article 29 of the CRPD explicitly requires the States Parties to guarantee to people with disabilities the opportunity to enjoy political rights on an equal basis with others and to undertake to ensure, among other things, accessible voting procedures (see paragraph 54 above).

115. Lastly, the Court notes that, notwithstanding the difference in scope between Article 14 and Article 1 of Protocol No. 12, the meaning of the term "discrimination" in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see *Pilav v. Bosnia and Herzegovina*, no. 41939/07, § 40, 9 June 2016, and *Sejdić and Finci*, cited above, §§ 55-56). Therefore, in principle, the same standards developed by the Court in its case-law concerning the protection afforded by Article 14 are applicable to cases brought under Article 1 of Protocol No. 12 (see *Napotnik*, cited above, § 70, and *Ádám and Others*, cited above, § 83).

(b) Assessment of the present case

116. In the light of the above-mentioned principles the Court is called on to assess whether the Slovenian authorities complied with their obligations under Article 1 of Protocol No. 12 (as regards the 2015 Referendum) and Article 14 read in conjunction with Article 3 of Protocol No. 1 (as regards the possibility for the first applicant to vote in 2019 EP Elections).

117. The Court notes that Article 3 of Protocol No. 1 stipulates that there must be free expression of opinion in the choice of the legislature and that secrecy must be observed in respect of the voting procedure. Under the relevant domestic legislation these guarantees also apply to voting in public referendums (see paragraph 39 above). The Court furthermore notes that it has not been argued that the applicable domestic legislation contained provisions divesting people with mobility impairments of the aforementioned rights or restricting their enjoyment of those rights in any way. The question is therefore not one of direct discrimination by way of unjustified differentiation but rather of the compliance of the national authorities with their positive obligation to take appropriate measures to enable the applicants, whose mobility was impaired due to disability, to exercise their right to vote on an equal basis with others.

(i) The 2015 Referendum

118. The Court finds it established that on the day of the 2015 Referendum the entrances to the applicants' respective polling stations were equipped with ramps, which the applicants used in order to enter. However, the applicants argued that the appropriate adaptations had not been made inside the polling stations, resulting in them not being able to vote in secrecy and on an equal basis with others.

119. The Court firstly observes that a general and complete adaptation of polling stations in order to fully accommodate wheelchair users would no doubt facilitate their participation in the voting process. However, it reiterates that the States enjoy a margin of appreciation in assessing the needs of people with disabilities in respect of elections and the means of providing them with adequate access to polling stations within the context of the allocation of limited State resources (see *Mółka*, cited above); that margin of appreciation no doubt applies also with respect to referendums. The national authorities are in a better position to carry out such an assessment than an international court (ibid.). The Court furthermore observes that the applicants were able to vote at the polling stations in proximity of their residence, in accordance with their wishes (see paragraphs 10 and 17 above), as opposed to having to go to specially designated polling stations. While adaptations to the voting facilities (such as tables, voting booth and ballot box) were not made in advance, assistance could be provided to the applicants on the spot by means of a reasonable accommodation of their needs (see, for instance, the CRPD Committee's General Comment No. 2, cited in paragraph 55 above, and paragraphs 13 and 20 above).

120. In this regard the Court finds, on the basis of the parties' submissions, that during the 2015 Referendum both applicants were able to mark their ballot paper by themselves. The first applicant alleged that he had had to cast his vote in the middle of the room, with several people around him, but failed to explain how this had impacted the secrecy of the voting procedure and whether he had made any request or complaint in this regard to electoral officers. In the proceedings before the Court he made this allegation only after the Government had been given notice of the application, and supported it with the photos that had been published on Facebook by the first applicant's nephew, Mr Jurij Toplak, on the day of the referendum (see paragraph 26 above), with accompanying text that read: "My uncle, Franc Toplak, voted in an accessible polling station today. One polling station adjusted, 3,000 to go". Those photos had clearly been posted in order to show that the first applicant had been able to vote at an accessible polling station (see paragraph 25 above). The second applicant submitted that he had needed the help of a passer-by in order to use the ramp at the entrance to his polling station (see paragraph 26 above). As regards his actual voting, he provided no specific information during the

proceedings before the Court. In the domestic proceedings he indicated that he had been able to mark and deposit his ballot paper. His grievance related only to the inclination of the ramp (see paragraph 21 above).

121. The Court understands that since voting in public referendums is organised *ad hoc* in buildings that otherwise serve other purposes it might be particularly difficult to ensure full accessibility in respect of the voting process for people with different types of disability in advance – especially if the State aims to provide a high number of polling stations (as seems to be the case in Slovenia – see paragraph 108 above). Since the improvement of accessibility in the built environment may take time (see, for instance, the CRPD Committee's General Comment No. 6, at paragraph 56 above), it is essential that in the meantime the domestic authorities react with the requisite diligence to ensure that people with disabilities can vote freely and by secret ballot. In the present case, the National Commission responded promptly and constructively to the applicants' request that their respective polling stations be rendered accessible (see paragraphs 10, 12, 17 and 18 above). At the request of the first applicant a ramp was installed at the polling station for his electoral area. At the request of the second applicant, a visit to the building (school) that would serve as the polling station for his electoral area was arranged a few days before the day of the 2015 Referendum in order to ensure that he would be able to enter the building and the polling room (ibid.). Even if the applicants did encounter certain problems when participating in the 2015 Referendum, those problems do not appear to have produced a particularly prejudicial impact on them and been such as to have reached the threshold of discrimination (see *Napotnik*, cited above, § 73, and *Ádám and Others*, cited above, § 87) or to indicate indifference to their needs on the part of the respondent State (compare, *mutatis mutandis*, the above-cited cases of *Çam*, § 68, and *Guberina*, § 86). There has therefore been no violation of Article 1 of Protocol No. 12 as regards the 2015 Referendum with respect to both applicants.

(ii) The 2019 EP Elections

122. The first applicant did not vote in the 2019 EP Elections, allegedly because he was unable to hold a pen and thus would not be able to mark his ballot paper by himself. He argued that the respondent State should have made it possible for him to vote using a voting machine (see paragraph 102 above). The Court notes that the use of voting machines was no longer possible following the 2017 Amendment; thus, they could not be provided to anyone during the 2019 EP Elections (see paragraph 42 above). The Court must now assess whether, having regard to other options available to the first applicant, the respondent State complied with its positive obligations to secure his rights under Article 14 of the Convention, read in conjunction with Article 3 of Protocol No. 1 to the Convention.

123. The Court notes that under the Elections Act, the first applicant could have voted either by going physically to his local polling station (which, pursuant to the 2017 Amendment, had to be wheelchair accessible) or by post, and possibly also at his home (see paragraphs 40 and 42 above). However, in view of his inability to mark the ballot paper by himself, he would – if he had chosen any of these options – have had to be assisted by another person, who would have marked his ballot paper for him and taken care of other practicalities, such as depositing the ballot paper in the ballot box or dispatching it by post. The Elections Act allowed for such assistance to be provided to the first applicant, who was free to choose the person to assist him.

124. The Court further notes that the first applicant did not allege that he had been unable to request the assistance of another person. It observes in this regard that the first applicant had a family and was assisted by several people during the 2015 Referendum (see paragraph 25 above). That said, it is true that the provision of this kind of assistance most likely meant that the first applicant, who owing to his medical condition was unable to mark the ballot paper by himself, would have had to disclose his electoral choice to the person assisting him.

125. The Court observes in this respect that the Constitutional Court, which was no doubt best placed to interpret the relevant domestic law, explained that the voting assistant had been obliged to respect the secrecy of the voting procedure under, *inter alia*, the Penal Code (see paragraph 35 above). It furthermore observes that this kind of assistance with voting, provided that the voter's free will is respected, is in compliance with the international standards in the field, such as Article 29 of the CRPD and the Venice Commission's Revised Interpretative Declaration (see paragraphs 54, 58, 59 and 61 above).

126. As regards technology-assisted voting, the Court notes that it is also mentioned in the international instruments as one means of ensuring the right of people with disabilities to vote (see, for instance, paragraphs 54 and 58 above). The Court understands that voting machines might afford a higher level of autonomy in voting for some people with disabilities. When assessing whether in view of the foregoing the respondent State should have made voting machines available to the first applicant, the Court must have regard to the following factors.

127. Firstly, the importance of the inclusion of people with disabilities in political life (which requires accessible voting procedures) has been clearly recognised in international instruments (see paragraphs 54, 57, 58, 59 and 61 above). However, the use of assistive technologies has been mentioned as one means of supporting people with disabilities in exercising their voting rights and not as a necessary requirement that would need to be immediately implemented (ibid.; see also paragraphs 55-56 above). The CRPD Committee's decision of 16 February 2018 in respect of case no.

19/2014 does not seem to lead to a different conclusion (see paragraph 57 above).

128. Secondly, the Court notes that the use of assistive technologies no doubt requires significant financial investment (especially if it is to be made available on a larger scale), that the operation of voting machines poses potential problems for the secrecy of the voting procedure (see paragraphs 62 and 63 above), and that in view of the information contained in the Constitutional Court's decision (see paragraph 36 above), voting machines do not appear to be widely available in the member States. Indeed, there is no indication in the present case of a consensus having been reached among the member States as to the use of voting machines as a requirement for the effective exercise of the voting rights by people with disabilities (see paragraphs 35, 60 and 109 above).

129. Therefore, and because assistance to people with disabilities may take a variety of forms, the decision as to whether voting machines should be used for that purpose is to be made primarily by the national authorities. They, by reason of their direct and continuous contact with the vital forces of their countries, are in principle better placed than an international court to evaluate local needs and conditions in this regard (see *Çam*, cited above, § 66). It is, however, important that those authorities take great care with the choices they make in this sphere, in view of the impact of those choices on people with disabilities, whose particular vulnerability cannot be ignored (see *Enver Şahin*, cited above, § 61).

130. Bearing this in mind, the Court notes that in the present case, the Constitutional Court – during proceedings in which both applicants participated – dealt with the question of whether the lack of availability of voting machines resulting from the 2017 Amendment was in compliance with the Constitution and with the international obligations of Slovenia. The Constitutional Court took account of, *inter alia*, the fact that a very small number of people with disabilities had used voting machines in the past, that such machines could not assist people with all types of disabilities and that their provision was linked to high costs (see paragraph 35 above). The reasons provided by the Constitutional Court appear persuasive and based on a careful assessment of past experience in using voting machines and on the compliance of the new regulation with international standards (see paragraphs 34-36 above; also contrast, *mutatis mutandis*, *Guberina*, cited above, § 92).

131. Therefore, and having regard to the other options available to the first applicant, especially the possibility of assistance by a person of his own choice (see paragraphs 123 to 125 above), the respondent State could not be said to have failed to strike a fair balance between the protection of the interests of the community and respect for the first applicant's rights and freedoms, as safeguarded by the Convention.

132. There has accordingly been no violation of Article 14, read in conjunction with Article 3 of Protocol No. 1, as regards the first applicant.

VII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

133. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

134. The applicants claimed 12,000 euros (EUR) each in respect of non-pecuniary damage.

135. The Government argued that the claim was excessive.

136. The Court, making its assessment on an equitable basis, as required by Article 41 of the Convention, awards the second applicant EUR 3,200 and the first applicant's daughters each EUR 1,600 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

137. The applicants also claimed EUR 18,000 each for the costs and expenses incurred before the domestic courts and EUR 9,000 each for those incurred before the Court.

138. The Government pointed out that the applicants had not submitted any proof of expenses concerning the domestic proceedings, nor had they specified in respect of which proceedings at domestic level they made their claim. The lawyer would have been entitled to legal fees based on the official lawyers' tariff or an agreement. However, the applicants had not submitted any such agreement. As regards the proceedings before the Court, the Government relied on the domestic lawyers' tariff and argued that each of the applicants was eligible to receive only EUR 1,500.

139. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the second applicant the sum of EUR 1,500 and the first applicant's daughters jointly the sum of EUR 1,500 for the proceedings before the Court, plus any tax that may be chargeable to them.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Holds* that the first applicant's daughters, Nataša Toplak and Renata Toplak, have standing to continue the present proceedings in the stead of the first applicant, Mr Franc Toplak;

3. *Decides* to join to the merits of the complaints under Article 13 the preliminary objections concerning the non-exhaustion of domestic remedies and dismisses them in so far as they concern the applicants' participation in the 2015 Referendum and the first applicant's inability to participate in the 2019 EP Elections;

4. *Declares* the second applicant's complaint concerning Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1 with respect to the 2019 EP Elections inadmissible and the remainder of the applications admissible;

5. *Holds* that there has been a violation of Article 13 of the Convention taken together with Article 1 of Protocol No. 12 as regards the participation at the 2015 Referendum with respect to both applicants;

6. *Holds* that there has been no violation of Article 13 of the Convention taken together with Article 14 and Article 3 of Protocol No. 1 as regards the 2019 EP Elections with respect to both applicants;

7. *Holds* that there has been no violation of Article 1 of Protocol No. 12 as regards the 2015 Referendum with respect to both applicants;

8. *Holds* that there has been no violation of Article 14 in conjunction with Article 3 of Protocol No. 1 as regards the first applicant's lack of participation in the 2019 EP Elections;

9. *Holds*

   (a) that the respondent State is to pay the second applicant and the first applicant's daughters, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the

Convention, the following amounts at the rate applicable at the date of settlement:

(i) EUR 3,200 (three thousand two hundred euros) to the second applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,600 (one thousand six hundred euros) to each of the first applicant's daughters, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(iii) EUR 1,500 (one thousand five hundred euros) to the second applicant, plus any tax that may be chargeable to him, in respect of costs and expenses;

(iv) EUR 1,500 (one thousand five hundred euros) jointly to the first applicant's daughters, plus any tax that may be chargeable to them, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

10. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 26 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Stanley Naismith
Registrar

Jon Fridrik Kjølbro
President