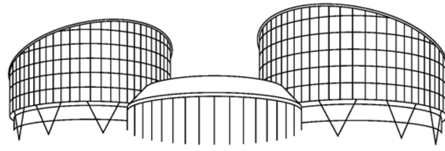

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 45751/17
Nikolche BABOVSKI
against North Macedonia

The European Court of Human Rights (Fifth Section), sitting on 3 June 2021 as a Committee composed of:
Mārtiņš Mits, *President,*
Jovan Ilievski,
Ivana Jelić, *judges,*
and Martina Keller, *Deputy Section Registrar,*
Having regard to the above application lodged on 21 June 2017,
Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,
Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Nikolche Babovski, was born in 1964 and lives in Bitola. He was represented before the Court by Mr D. Koroveshovski, a lawyer practising in Ohrid.

2. The Government of the Republic of North Macedonia (“the Government”) were represented by their Agent, Ms D. Djonova.

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

4. The applicant became politically active in 2002.

A. The applicant’s involvement in the elections for Parliament held on 5 June 2011

5. On 4 May 2011 the applicant, as a parliamentary candidate in the early elections held on 5 June 2011, in accordance with Article 65 of the Electoral Code (see paragraph 22 below), submitted a notarised written statement to the Fact Verification Commission (hereinafter “the Lustration

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Commission" or "the Commission") stating that he had not collaborated with the State security bodies.

6. Pursuant to the relevant legislation and the electoral schedule, the lists of candidates were to be submitted to the State Electoral Commission (hereinafter "the SEC") no later than 5 May 2011. The SEC was obliged to establish, no later than forty-eight hours after their receipt, that the lists had been submitted in accordance with the Electoral Code.

7. On 8 May 2011 the SEC adopted a decision confirming the list of candidates of the coalition led by the Social Democratic Union of Macedonia. On the final list, the applicant was placed as the eleventh candidate for the fifth electoral district.

8. In accordance with the method applied for allocating seats in Parliament (see paragraph 25 below), the final results of the early parliamentary elections of 5 June 2011 meant that the coalition led by the Social Democratic Union of Macedonia in the fifth electoral district won eight seats in Parliament. Since the applicant had been the eleventh candidate on the list, he was not elected.

B. Lustration proceedings against the applicant

9. On 3 June 2011 the Lustration Commission, which was competent to examine the reliability of statements on collaboration (or non-collaboration) with State security bodies, adopted a conclusion declaring that the applicant's statement did not correspond to the data available to the Commission, and invited the applicant to declare whether he disagreed with that conclusion. The conclusion was submitted to the applicant on 6 June 2011, the day after the early parliamentary elections had taken place.

10. On 9 June 2011 the applicant sent a response to the Commission disagreeing with the conclusion of 3 June 2011.

11. On 13 June 2011 the Commission adopted a decision pursuant to the Additional Requirement for Public Office Act (hereinafter "the 2008 Lustration Act" – see paragraphs 27 - 30 below), finding that the applicant's statement did not correspond to the data available to the Commission and that he had thus not fulfilled the requirements for holding public office.

12. The applicant challenged that decision before the Administrative Court, *inter alia* denying that he had had any connections or that he had been involved in any activities of the State security bodies. He did not dispute that he had been summoned and questioned by the security bodies for information purposes, but said that he had had no intention of being a secret collaborator. He further argued that he had already stood as a candidate in previous parliamentary elections.

13. On 20 April 2012 the Administrative Court allowed the applicant's appeal and quashed the Lustration Commission's decision of 13 June 2011.

14. On 20 June 2012 the Parliament repealed the 2008 Lustration Act by enacting a new Law on determination of the criterion for limiting the holding of public office, on access to documents and on publication of information on cooperation with State security bodies (hereinafter "the 2012 Lustration Act").

15. On 30 July 2012 the Lustration Commission adopted a fresh decision pursuant to the 2012 Lustration Act, finding that the applicant had collaborated with the State security bodies. The applicant challenged that decision before the Administrative Court.

16. By a judgment of 29 January 2014 the Administrative Court quashed the Lustration Commission's decision of 30 July 2012. Subsequently, on 18 September 2014, the Commission adopted a new decision, which was challenged by the applicant.

17. On 7 April 2016 the Administrative Court quashed the Lustration Commission's decision of 18 September 2014.

18. In its judgment of 7 April 2016 the Administrative Court referred, *inter alia*, to the provisions of the Act terminating the 2012 Lustration Act (see paragraph 33 below), to the effect that all proceedings initiated before the Commission for which no decision had been adopted before 1 September 2015 were to be terminated. The Administrative Court instructed the Lustration Commission, in resumed proceedings against the applicant, to take into account all legal provisions regulating the matter of lustration, including the fact that its decision of 18 September 2014 had been set aside and that the judgment of 7 April 2016 had been effective *ex tunc*. Thus, although the Commission had initiated proceedings against the applicant, no final decision had been adopted before 1 September 2015 (see paragraph 33 below).

19. On 12 December 2016 the High Administrative Court declared an appeal by the Commission against the Administrative Court's judgment of 7 April 2016 inadmissible, finding that the Commission had no legal standing to appeal (only the relevant State Attorney's office having the competence to do so).

20. On 21 February 2017 the High Administrative Court rejected a request by the Lustration Commission for the reopening of the proceedings. That judgment was served on the Commission on 2 March 2017 and on the applicant's representative on 6 March 2017.

RELEVANT DOMESTIC LAW AND PRACTICE

A. Electoral Code - consolidated version (Official Gazette 54/2011)

21. Article 31 of the Code contains the list of responsibilities of the SEC, which includes the approval and publication of the lists of candidates for Parliament and the adoption of a decision that confirms the adopted lists

of candidates or rejects them if they are not drawn up in accordance with the provisions of the Code.

22. Article 65 of the Code regulates the procedure for submitting the list of candidates on a form prescribed by the SEC. Each candidate should submit a notarised written statement, in accordance with the Code, certifying that he or she did not collaborate with the State security bodies. The order of the candidates on the list is determined by the person who submits it.

23. Article 67 of the Code provides that the SEC, upon receipt of the list of candidates, is to determine whether it has been submitted within the time–limit set and whether it complies with the provisions of the Code. Should the SEC determine that the list fulfils the requirements prescribed by the Code, it confirms the list as submitted by means of a decision.

24. Article 69 of the Code provides that the SEC is to publish the confirmed lists of candidates for Parliament in the daily newspapers no later than twenty-five days prior to election day.

25. Article 127 of the Code specifies the method for determining the results and the distribution of the seats in parliamentary elections. The SEC tabulates and determines the overall results of the voting in the electoral districts in accordance with the records submitted by the local electoral commissions and the election material. Subsequently, the SEC determines the results for each electoral district separately on the basis of the total number of votes received by each of the lists of candidates. The election results are determined by applying the d'Hondt method. Once the total number of votes cast for the different lists of candidates in the electoral district has been determined (the so-called "electorate"), each list is separately divided by the line of divisors 1, 2, 3, 4, and so on, until all the seats in the electoral district are allocated by applying this principle. The quotients of the division are ordered by size, and the number of largest quotients to be taken into consideration will be the same as the number of members of parliament being elected in the electoral district. Each list of candidates is awarded a number of parliamentary seats corresponding to the number of largest quotients it obtains out of the number of quotients referred to in the above-mentioned calculation. Should there be two identical quotients when distributing the last seat in Parliament, the seat is allocated by drawing lots. When allocating parliamentary seats, the number of candidates elected corresponds to the number of seats won by the list. Candidates are elected from the list of candidates in sequential order.

26. Under Article 128 of the Code, the SEC prepares a separate record for determining the results of each electoral district. The records include information on the voting results, the total number of polling places, the total number of voters registered on the voter list for the particular electoral district, the total number of voters who have cast their vote, the total number of invalid ballots, the total number of votes that each list of candidates has

received, the number of parliamentary seats won by the list of candidates and the names and surnames of the candidates elected to Parliament.

B. Additional Requirement for Public Office Act (*Закон за определување дополнителен услов за вршење на јавна функција* – “the 2008 Lustration Act”)

27. Section 5 of the 2008 Lustration Act contained a list of persons to which the provisions of the Act applied.

28. Section 9 of the Act provided that the obligation to submit a statement to the Lustration Commission for each candidate occurred simultaneously with the candidate’s signing of an irrevocable written statement of consent in accordance with the provisions of the Code. A person referred to in section 5 who was a candidate for public office and who would not submit a statement to the Commission did not meet the conditions to run for public office.

29. Under section 29-b(1) of the Act, the Commission was required to submit, no later than three days following its completion of the procedure for verification of the facts (that is, if that procedure had been initiated before the competent court and after that court’s decision had become final), a final decision to Parliament, the government and the SEC about anyone who held public office and who had cooperated with the State security bodies. Such a person would not have met the additional criteria to run for public office while this Act was applicable.

30. Other relevant provisions of this Act were summarised in *Ivanovski v. the former Yugoslav Republic of Macedonia* (no. 29908/11, §§ 61-81, 21 January 2016).

C. Law on determination of the criterion for limiting the exercise of public office, on access to documents and on publication of information on cooperation with State security bodies (*Закон за определување на услов за ограничување за вршење на јавна функција, пристап на документи и објавување на соработката со органите на државната безбедност* – “the 2012 Lustration Act”, Official Gazette no. 86/2012)

31. With the enactment of the above-mentioned Law, the 2008 Lustration Act ceased to exist and was no longer applicable.

32. The relevant provisions of this Law were summarised in *Karajanov v. the former Yugoslav Republic of Macedonia* (no. 2229/15, §§ 18-26, 6 April 2017).

D. Act terminating the 2012 Lustration Act (Official Gazette no. 143/2015)

33. This Act repealed the 2012 Lustration Act. All ongoing lustration proceedings were to be concluded. The Lustration Commission's mandate was likewise to be regarded as having expired. The Act came into force on 1 September 2015.

COMPLAINT

34. The applicant in substance complained under Article 3 of Protocol No. 1 to the Convention that as a result of unlawful lustration proceedings, he had been prevented from taking part in the 2011 parliamentary elections.

THE LAW

35. The applicant complained in substance that, in failing to obtain the relevant certification from the Lustration Commission, he had been prevented from standing in the 2011 parliamentary elections, contrary to the guarantees provided for by Article 3 of Protocol No. 1, which reads as follows:

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

A. The parties' submissions

36. The Government firstly submitted that the applicant did not have victim status. Alternatively, they argued that there had been no violation of the applicant's right under Article 3 of Protocol No. 1 to the Convention because he had participated in the 2011 parliamentary elections and the lustration proceedings had in no way prevented him from enjoying his right to stand for election. The fact that he had not been elected, in accordance with the method applied for the allocation of seats, had no connection with the lustration proceedings. The applicant's contention that if the list on which he was a candidate had won more seats in Parliament then his mandate would not have been confirmed was hypothetical, false and irrelevant in the circumstances. Furthermore, the Government noted that there was no final decision of the Lustration Commission establishing that the applicant had collaborated with the State security bodies, that he had never been prevented from holding public office (since he currently held such an office) and that all lustration-related legislation had meanwhile been repealed.

37. The applicant maintained that the lustration proceedings had affected his reputation and honour, causing him distress and mental pain. He had indisputably been a candidate for Parliament, but at the same time, if the coalition for which he had been a candidate had won more seats in the electoral district and he had actually been elected, his mandate would not have been confirmed because of the ongoing lustration proceedings. The applicant further noted that, although the Commission's decision had not been adopted before the elections, had he been elected it would have certainly had an effect on his mandate. Lastly, he argued that the lustration-related laws had formed a part of the legal order long enough to cause irreversible damage.

B. The Court's assessment

38. The Court considers that it is not necessary to examine the preliminary objections raised by the Government, as the application in the present case is in any event inadmissible for the following reasons.

1. General principles

39. Article 3 of Protocol No. 1 to the Convention guarantees individual rights, including the right to vote and to stand for election (see *Davydov and Others v. Russia*, no. 75947/11, § 271, 30 May 2017).

40. The Court has consistently highlighted the importance of the democratic principles underlying the interpretation and application of the Convention, and has emphasised that the rights guaranteed under Article 3 of Protocol No. 1 to the Convention are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 58, ECHR 2005-IX). Nonetheless, those rights are not absolute. There is room for "implied limitations", and Contracting States are given a margin of appreciation in this sphere (see *Matthews v. the United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV; and *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II). While the Contracting States enjoy a wide margin of appreciation in imposing conditions on the right to vote and to stand for election, it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 to the Convention have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness, that they are imposed in pursuit of a legitimate aim, and that the means employed are not disproportionate or arbitrary (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 52, Series A no. 113, and *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 09 (iii), ECHR 2008).

In particular, States have broad latitude to establish constitutional rules on the status of members of parliament, including criteria for declaring them ineligible. Although such criteria have a common origin in the need to ensure both the independence of elected representatives and the freedom of electors, they vary in accordance with the historical and political factors specific to each State; the multiplicity of situations provided for in the constitutions and electoral legislation of numerous member States of the Council of Europe shows the diversity of possible approaches in this area. For the purposes of applying Article 3, any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another. However, the State's margin of appreciation in this regard is limited by the obligation to respect the fundamental principle of Article 3, namely "the free expression of the opinion of the people in the choice of the legislature" (see *Podkolzina*, cited above, § 33).

41. As regards the right to stand as a candidate for election, that is, the so-called "passive" aspect of the rights guaranteed by Article 3 of Protocol No. 1 to the Convention, the Court has been even more cautious in its assessment of restrictions in that context than when it has been called upon to examine restrictions on the right to vote – the so-called "active" element of the rights under Article 3 of Protocol No. 1 to the Convention. In the case of *Melnychenko v. Ukraine* (no. 17707/02, § 57, ECHR 2004-X), the Court observed that stricter requirements could be imposed on eligibility to stand for election to Parliament than was the case for eligibility to vote. In fact, while the test relating to the "active" aspect of Article 3 of Protocol No. 1 has usually included a wider assessment of the proportionality of the statutory provisions disqualifying a person or a certain group of persons from the right to vote, the Court's test in relation to the "passive" aspect of the above-mentioned provision has been limited largely to a check on the absence of arbitrariness in the domestic procedures leading to the disqualification of an individual from standing as a candidate (see *Ždanoka v. Latvia* [GC], no. 58278/00, § 115 (e), ECHR 2006-IV).

2. Application of the general principles to the present case

42. In the present case, the Court observes that the applicant was registered in the final list of candidates and stood in the 2011 parliamentary elections, but was not elected, for reasons wholly unrelated to the lustration proceedings (see paragraphs 7 and 8 above). Moreover, the lustration proceedings were initiated after those elections had taken place and were terminated as a result of the changes in the relevant domestic law (see paragraphs 18 and 33 above). No final decision against the applicant was ever adopted in the above-mentioned proceedings and he was never declared to have been a collaborator of the State security bodies.

43. The Court further notes that the applicant's complaints as to what would have happened had he been elected are theoretical and do not reflect the reality of the situation, namely that the lustration proceedings had no effect on his rights guaranteed under Article 3 of Protocol No. 1 to the Convention. Furthermore, it would appear that the applicant currently holds public office in the respondent State.

44. Lastly, the applicant's complaint of a violation of his honour and reputation, a matter which falls under Article 8 of the Convention, has already been declared inadmissible by the Court on 23 September 2019.

45. Accordingly, it follows that the application is manifestly ill-founded and as such must be rejected as inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 24 June 2021.

Martina Keller Deputy Registrar	Mārtiņš Mits President