

Proceedings leading to dismissal of Supreme Court Judge were unfair

In today's Chamber judgment in the case of [Oleksandr Volkov v. Ukraine](#) (application no. 21722/11), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

Four violations of Article 6 (right to a fair trial) of the European Convention on Human Rights, and

A violation of Article 8 (right to respect for private and family life)

The case concerned the dismissal of a Supreme Court Judge.

The Court held in particular: that the proceedings leading up to Mr Volkov's dismissal had not fulfilled the requirements of an "independent and impartial tribunal"; that the proceedings before the High Council of Justice, which initiated the inquiries leading up to his dismissal, had been unfair as there were no time-limits for such proceedings; that the vote in Parliament on his dismissal had been unlawful; and, that the chamber of the Higher Administrative Court, which reviewed the case, had not complied with the principle of a "tribunal established by law".

Under Articles 41 (just satisfaction) and 46 (binding force and execution of judgments), the Court, in view of the serious systemic problems concerning the functioning of the Ukrainian judiciary disclosed in Mr Volkov's case, recommended Ukraine to urgently reform its system of judicial discipline. It further held that, given the very exceptional circumstances of the case, Ukraine was to reinstate Mr Volkov in the post of Supreme Court judge at the earliest possible date.

Principal facts

The applicant, Oleksandr Volkov, is a Ukrainian national who was born in 1957 and lives in Kyiv. From June 2003 he was judge of the Supreme Court and from March 2007 he was president of the Military Chamber of that court.

In December 2007, Mr Volkov was elected to the post of member of the High Council of Justice ("the HCJ"), but did not assume the office following the refusal of the chairman of the parliamentary committee of the judiciary to allow him to take the oath of office. In December 2008 and March 2009 respectively, two members of the HCJ, R.K. and V.K. - who was elected president of the HCJ in March 2010 - conducted preliminary inquiries into possible misconduct by Mr Volkov. They concluded that he had reviewed decisions delivered by Judge B., his wife's brother, on several occasions - some of them dating back to 2003 - and that he had made gross procedural violations when dealing with

¹ Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

cases involving a limited liability company, some of his actions dating back to 2006. Following these inquiries, V.K., as President of the HCJ, submitted two applications to Parliament for dismissal of Mr Volkov from the post of judge.

On 17 June 2010, the Parliament, having considered these applications by the HCJ, as well as the recommendation of the parliamentary committee on the judiciary ("the parliamentary committee"), voted for Mr Volkov's dismissal for "breach of oath". Mr Volkov complained that the proceedings before the HCJ had lacked impartiality and independence given the way in which it was composed. He also claimed that some members of the HCJ had been involved in the proceedings before the parliamentary committee. He further complained about the electronic vote in Parliament, alleging that the Members of Parliament who had attended had used their absent peers' voting cards. This misuse of voting cards was confirmed by statements made by Members of Parliament and a video.

Mr Volkov challenged his dismissal before the Higher Administrative Court ("the HAC"), which found that the HCJ's application to dismiss him following V.K.'s inquiry had been lawful and substantiated. The HAC further found that the application following R.K.'s inquiry had been unlawful, because Mr Volkov and his wife's brother had not been considered relatives under the legislation in force at the time. However, the HAC refused to quash the HCJ's acts taken in that case, noting that under the applicable provisions it was not empowered to do so. The HAC further noted that there had been no procedural violations either before the parliamentary committee or at the Parliament.

Complaints, procedure and composition of the Court

Relying on Article 6, Mr Volkov complained in particular that: his case had not been considered by "an independent and impartial tribunal"; the proceedings on his dismissal had been unfair as there had been no limitation period; Parliament had adopted the decision on his dismissal without proper examination of the case and by abusing the electronic voting system; his case had been heard by a special chamber of the HAC which was not a "tribunal established by law"; and, the HAC was not competent to quash acts adopted by the HCJ. Relying on Article 8, Mr Volkov further complained that his dismissal from the post of judge had been an interference with his private and professional life. He also complained of a violation of Article 13 (right to an effective remedy).

The application was lodged with the European Court of Human Rights on 30 March 2011. A Chamber [hearing](#) took place in Strasbourg on 12 June 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Dean **Spielmann** (Luxembourg), *President*,

Mark **Villiger** (Liechtenstein),

Boštjan M. **Zupančič** (Slovenia),

Ann **Power-Forde** (Ireland),

Ganna **Yudkivska** (Ukraine),

Angelika **Nußberger** (Germany),

André **Potocki** (France),

and also Claudia **Westerdiek**, *Section Registrar*.

Decision of the Court

Article 6

As to the principles of an “independent and impartial tribunal”, the Court found that the facts of the case pointed both to structural deficiencies in the proceedings before the HCJ and to the appearance of personal bias of some of its members who had determined Mr Volkov’s case.

In particular, under the law in force at the time, non-judicial staff, appointed directly by the Ukrainian Government and the Parliament, had comprised the vast majority of the HCJ’s members. Of its sixteen members who had determined Mr Volkov’s case, only three had been judges. Furthermore, the Minister of Justice and the Prosecutor General were *ex officio* members of the HCJ. The Court referred to the concern of the Council of Europe’s Venice Commission that the presence of the Prosecutor General on a body concerned with the appointment, disciplining and removal of judges created a risk that judges would not act impartially in such cases or that the Prosecutor General would not act impartially towards judges of whose decisions he disapproved. Finally, the members of the HCJ who had requested Mr Volkov’s dismissal had subsequently taken part in the decisions to remove him from office. Mr Volkov’s contentions of personal bias also had to be taken into consideration as regards the chairman of the parliamentary committee of the judiciary, who was at the same time a member of the HCJ. The chairman had both refused to let Mr Volkov take the oath of office as a member of the HCJ and had published an opinion in which he strongly disagreed with an action by Mr Volkov in a case in which the latter had been a claimant.

The structural defects of the proceedings had only been reinforced at the parliamentary stage. Two of the HCJ’s members had also been members of the parliamentary committee of the judiciary, and the considerations concerning the lack of impartiality of its chairman were also pertinent to the parliamentary proceedings. In the plenary meeting of Parliament, the case had been presented by the chairman of the committee and by the president of the HCJ, and the procedure merely entailed an exchange of general opinions.

The Court was further not persuaded that the procedure before the HAC had offered sufficient review in the case. It noted that the HAC’s inability to formally quash decisions it had declared unlawful and the lack of rules as to the progress of disciplinary proceedings resulted in substantial uncertainty about what the consequences of its judicial declarations were. Examples from the judicial practice submitted by the Ukrainian Government suggested that there was no automatic reinstatement in the post of judge exclusively on the basis of the HAC’s declaratory decision. Furthermore, important arguments advanced by Mr Volkov, in particular his allegation of lack of impartiality, had not been properly addressed by the HAC. Moreover, the judges of the HAC who performed the judicial review had also been under the disciplinary jurisdiction of the HCJ and could themselves have been subjected to disciplinary proceedings before the HCJ. Their independence and impartiality, when deciding Mr Volkov’s case, was therefore put into question.

The Court concluded that there had been a **violation of Article 6 as regards the principles of an independent and impartial tribunal.**

As regards the **complaint that the proceedings before the HCJ had been unfair as there had been no limitation period**, the Court noted that the facts examined by the HCJ in 2010 had dated back to 2003 and 2006 respectively. Ukrainian law in force at the time had not provided for any time limit on proceedings for dismissal of a judge for “breach of oath”. While the Court did not find it appropriate to indicate how long such a limitation period should be, it considered that an open-ended approach to disciplinary

cases involving the judiciary posed a serious threat to the principle of legal certainty. There had accordingly been a **further violation of Article 6** in that respect.

As regards the complaint that during the plenary vote on his dismissal **certain Members of Parliament had unlawfully cast votes belonging to other Members of Parliament** who were absent, the Court noted that this allegation was confirmed by certified statements of four Members of Parliament and by the video of the proceedings. The Government had not submitted any plausible arguments putting that evidence into question. The Court therefore found that the decision on Mr Volkov's dismissal had been voted on in the absence of the majority of the members of Parliament and in breach of the applicable provisions of Ukrainian law. There had accordingly been another **violation of Article 6** in that respect.

As regards the complaint that the chamber of the HAC which dealt with Mr Volkov's case had not complied with the principle of a "tribunal established by law", the Court noted that the composition of that chamber had been defined by a judge whose five-year term of president of the HAC had expired but who continued to act as its president. The relevant provisions of national law regulating the procedure for appointing presidents of the courts had been declared unconstitutional and new provisions had not yet been introduced. In the meantime, the appointment of presidents of the courts was a matter of serious controversy among the Ukrainian authorities. Under these circumstances, the Court could not find that the chamber deciding the case had been composed in a manner satisfying the **requirement of a "tribunal established by law"**. There had accordingly been a **fourth violation of Article 6** in that respect.

Article 8

The parties agreed that Mr Volkov's dismissal had constituted an interference with his right to respect for private and family life. The Court's finding that the parliamentary vote on the decision to remove him from office had not been lawful under national law was sufficient to find that this interference was not justified and therefore in violation of Article 8.

The Court further noted that at the time Mr Volkov's case was decided there were no guidelines or practice establishing a consistent interpretation of the notion of "breach of oath" and no adequate procedural safeguards had been put into place to prevent arbitrary application of the relevant provisions. In particular, national law had not set out any time-limits for proceedings against a judge for "breach of oath", which had made the discretion of the disciplinary authorities open-ended and had undermined the principle of legal certainty. Moreover, national law had not set out an appropriate scale of sanctions for disciplinary offences and had not developed rules ensuring their application in accordance with the principle of proportionality. Finally, as the Court had found under Article 6, there had been no appropriate framework for independent and impartial review of a dismissal for "breach of oath". There had accordingly been a violation of Article 8.

Application of Articles 41 (Just satisfaction) and 46 (Binding force and execution of judgments)

The Court reiterated that, while it was for the respondent State to choose, subject to supervision by the Committee of Ministers², the means to be used to meet its obligation under Article 46, it could itself exceptionally indicate the type of measures that might usefully be taken to put an end to the situation it had identified.

² Once a judgment becomes final, it is transmitted to the Committee of Ministers, the executive arm of the Council of Europe, for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

The Court noted that Mr Volkov's case disclosed serious systemic problems as regards the functioning of the Ukrainian judiciary, in particular as regards the separation of powers. Consequently it recommended that Ukraine urgently restructured the institutional basis of its legal system in order to reform the organisation of judicial discipline in the country.

Turning to individual measures, the Court did not consider the reopening of the domestic proceedings to be an appropriate form of redress for the violations of Mr Volkov's rights, as there were no grounds to assume that his case would be retried in accordance with Article 6 of the Convention in the near future. Given the very exceptional circumstances of the case, the Court held that Ukraine was to reinstate Mr Volkov in the post of Supreme Court judge at the earliest possible date.

As to the award of just satisfaction, the Court held that Ukraine was to pay Mr Volkov 6,000 euros (EUR) in respect of non-pecuniary damage and EUR 12,000 in respect of costs and expenses.

Separate opinion

Judge Yudkivska expressed a concurring opinion, which is annexed to the judgment.

The judgment is available only in English.

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