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Contact: John Darcy
Tel: 03 88 41 31 56

Date: 14/11/2019

DH-DD(2019)1331

Meeting: 1362nd meeting (December 2019) (DH)

Item reference: Action plan (13/11/2019)

Communication from Ukraine concerning the OLEKSANDR VOLKOV group of cases v. Ukraine (Application No. 21722/11)

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Réunion : 1362e réunion (décembre 2019) (DH)

Référence du point : Plan d'action

Communication de l'Ukraine concernant le groupe d'affaires OLEKSANDR VOLKOV c. Ukraine (Requête n° 21722/11) ***(anglais uniquement)***

УКРАЇНА
УПОВНОВАЖЕНИЙ У СПРАВАХ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ

Agent before the European
Court of Human Rights
Ukraine
вул. Архітектора Городецького, 13,
м. Київ, 01001, Україна

Agent du aupres de la
Cour Europeenne des Droits de I'Homme
I'Ukraine
13, Horodetskogo Arkhitektora St.
Kyiv, 01001, Ukraine

тел.:+380 44 364-23-93, факс: +380 44 271-17-83
E-mail: callcentre@minjust.gov.ua, themis@minjust.gov.ua, http://www.minjust.gov.ua

Mr Fredrik Sundberg

Head of Department Ad Interim Department for the execution of judgments of the European Court of Human Rights Directorate General 1 – Human Rights and Rule of Law

Council of Europe
F-67075 Strasbourg Cedex

As to the execution of the Court's judgment
in the Oleksandr Volkov group of cases

Dear Sir,

Herewith please find enclosed an addendum to Action Plan for the execution of the European Court of Human Rights judgments in *Oleksandr Volkov* group of cases (application no. 21722/11, judgment of 9 January 2013, final on 27 May 2013.)

This information has been also sent by e-mail.

Encl: on 4 pages.

Yours faithfully,

Irena KOVAL
Acting Agent
before the European Court of Human Rights

Execution of Judgments of the European Court of Human Rights

Additional information
submitted by the Government of Ukraine as an addendum to the Action Plan
in the group of cases *Oleksandr Volkov v. Ukraine*
(case of *Oleksandr Volkov v. Ukraine*, application no. 21722/11, judgment final on 27 May 2013)

With reference to the Indicative list of cases proposed for examination with debate and due to the Secretariat's proposition in accordance with item 5 of Section III of the procedure and working methods for the Committee of Ministers' Human Rights meetings (GR-H(2016)2-final) the Government of Ukraine would like to provide additional information which should be read jointly with the information already presented to the Committee of Ministers on 2 October 2019[1] as regards *Oleksandr Volkov* group of cases.

Further to the Committee of Ministers decision of September 2019 as regards *Oleksandr Volkov* group of cases the Government of Ukraine would like to clarify the issues appeared within the system of the judicial careers and discipline as a consequence of adoption on 16 October 2019 the Law of Ukraine "On Amendments to the Law of Ukraine 'On Judiciary and Status of Judges' and Some Laws of Ukraine on the Activity of Bodies of Judicial Governance", No. 193-IX[2] (the "**Law**").

The reasoning for the adoption of the above law is set out in the explanatory note, namely, *among other things*:

"… The judicial reform, which has been proclaimed and has taken place in the recent years, has outstanding issues, including to ensure access to justice for citizens, their right to a fair trial. As is evident from that are unlawful decisions of courts of all instances, the absence in some regions of Ukraine the judges in staff of domestic courts, which deprives citizens of their constitutional right to a defence in the court".

Experts noted that most of the problems in the judicial system are related to the activities of bodies of judicial governance, for example, they referred to the virtually unlimited discretion of members of the High Qualification Commission of Judges of Ukraine (the **"HQCJ"**) when conducting qualification evaluation of judges or delaying the consideration of disciplinary complaints against judges.

In order to rectify these shortcomings, it is proposed to clarify the powers of bodies of judicial governance, including the principles of activity of the High Council of Justice (the **"HCJ"**), to change the procedure for forming the composition of the HQCJ, as well as to improve the procedure for considering a disciplinary complaint".

The purpose and task of the above Law is to comprehensively regulate the organisation of activities of the HQCJ and the HCJ.

In order to achieve this aim, a new procedure for the formation of the HQCJ was introduced, *i.e.*, the HQCJ will include twelve members appointed by the HCJ on the results of the competition. The members of the HQCJ should be appointed for a term of four years (to be found in Article 94

[1] https://hudoc.exec.coe.int/ENG#{%22EXECIdentifier%22:[%22DH-DD(2019)1130E%22]}
[2] https://zakon.rada.gov.ua/laws/show/193-ix?lang=en

(1) of the Law of Ukraine "On Judiciary and Status of Judges"). The HCJ for the competition for the position of a member of the HQCJ shall establish a selection board and approve its personal composition. The Selection Board for appointing members of the HQCJ shall be made up of six members: three members selected by the Council of Judges of Ukraine and three – among international experts specialised in the prevention of corruption according to the provision of the Law of Ukraine "On the High Anti-Corruption Court", and appointed by International Organisations. The Selection Board shall decide by simple majority, but the three votes of international experts are needed. The Selection Board shall have the technical support of the HCJ (see, *among other things*, new Article 95-1 of the above Law).

Involvement of international experts can contribute to the objectivity of the competition for the position of a member of the HQCJ.

The Public Council of Integrity is formed to assist the HQCJ in establishing the compliance of a judge (candidate for a judge) with the criteria of professional ethics and integrity for the purposes of qualification evaluation. The Public Council of Integrity:

1) collects, verifies and analyses information regarding the judge (candidate for the position of judge);

2) provide the HQCJ with information about the judge (candidate for the position of judge);

3) if appropriate, provides the HQCJ with a conclusion that the judge (candidate for the position of judge) does not meet the criteria of professional ethics and integrity, which is attached to the candidate's dossier or judge's file;

4) delegates a representative to participate in a meeting of the HQCJ on the qualification evaluation of judge (candidate for the position of judge);

5) has the right to create an information portal for gathering information on the professional ethics and integrity of judges, candidates for the post of judge (to be found in Article 87 of the Lae of Ukraine "On the Judiciary and the Status of Judges").

In this regard, the distribution of powers between the HCJ and the two newly created commissions is *per se not* against international standards.

Moreover, the above Law introduces changes to the disciplinary proceedings with the aim at speeding them up and making them more transparent, namely, new Article 42 (4) of the Law of Ukraine "On HCJ" states that the term of disciplinary proceedings shall not exceed sixty days from the date of receipt of the disciplinary complaint: new Article 51 of the Law of Ukraine "On HCJ" envisages that the HCJ shall consider appeals against the decision of the Disciplinary Chamber not later than thirty days from the day of their receipt.

As to the reduction in the number of judges of the Supreme Court it is worth noting that new Article 37(1) of the Law of Ukraine "On Judiciary and Status of Judges" envisages that the Supreme Court is composed of judges of not more than one hundred.

It is important to note that the President of Ukraine submitted to the Parliament a Draft Law of Ukraine "On Amendments to the Code of Commercial Procedure, the Code of Civil Procedure,

the Code of Administrative Justice of Ukraine on improving the review of court decisions in appeal and cassation proceedings", which was registered as per No. 2314 on 25 October 2019[3].

The reasoning for the adoption of the above law is set out in the explanatory note, namely, *among other things*:

" … the procedure for admission of cassation appeals does not contribute to the Supreme Court's fulfilment of its primary task – to ensure the consistency and unity of judicial practice and, consequently, to respect the principle of legal certainty as one element of the rule of law.

In this regard, we consider it necessary to introduce a system of admission and filters for cassation proceedings, namely the cassation proceedings may take place in exceptional cases when it is necessary to resolve the issue of application of substantive and/or procedural law, and not for the possibility "consideration for consideration" of the cassation complaint.

At the same time, the above systems of admission for cassation proceedings will not only ensure the formation of unity of judicial practice, but will over time significantly reduce the quantitative burden on this court.

The draft law also improves a number of rules in order to prevent the abuse of procedural rights by the participants of the case and to optimise the procedure for considering cases".

In addition, the purpose of the above Law No. 2314 is to balance the burden between domestic courts of different jurisdictions and to facilitate the swiftly review of cases.

Moreover, representative of the President in the Constitutional Court, Venislavskyi F., underlined, that the main reasoning of reduction the number of judges in the Supreme Court is implementing the world's best practices, *i.e.* about 120 judges work in the cassation courts in France[4].

As to the reducing the salary of the judges of the Supreme Court (from 75 minimum salary to 55) (to be found in Article 135 of the Law of Ukraine "On Judiciary and Status of Judges") the Government would like to note as follows..

In light of the foregoing it should be mentioned that it is a well-established principle of the European Court's case-law that since the margin of appreciation available to the legislature in implementing social and economic policies is wide, the Court will respect the legislature's judgment as to what is in the public interest, unless that judgment is manifestly without reasonable foundation (see *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, § 106, ECHR 2014). Certainly, it is an established case-law principle that where the legislature has made a choice by enacting laws which it considers to be in the general interest, the possible existence of alternative solutions does not in itself undermine the validity of the justification behind the contested legislation because specific circumstances may warrant it. It is not for the Court to say whether the legislation represented the best solution, provided that the authorities remain within the bounds of their margin of appreciation (see, for example, *Bečvář and Bečvářová v. the Czech Republic*, no. 58358/00, § 66, 14 December 2004). In addition, the Court observed that the salaries of the second, fifth and sixth

[3] http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67187
[4] https://dt.ua/POLITICS/u-zelenskogo-rozpovili-navischo-skorochuvati-kilkist-suddiv-u-verhovnomu-sudi-325769_.html

applicants', as well as the salary of the third applicant's husband, were reduced on basis of the Government Resolution no. 1494 of 1999. The adoption of the measure was justified by reference to the existence of the "particularly difficult economic and financial situation in Lithuania" in 1999, as noted by the Government and later confirmed by the Constitutional Court in its decisions of 23 August 2005 and 13 November 2007 (see paragraphs 43 and 44 above). In the view of the Constitutional Court, the reduction of public officials' salaries was required in order to finance education, healthcare, social welfare and other needs of society. On this last point the Court has already held that the notion of "public interest" is necessarily extensive and that the Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation (see *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 91, ECHR 2005 VI; Arras and Others v. Italy, no. 17972/07, § 78, 14 February 2012). On the basis of the materials in its possession, the Court sees nothing that would allow it to conclude that in deciding to lower civil servants' salaries the legislator did not have the public interest in mind (see *Rimantas Sanickas and 5 other applications v. Lithuania*, no. 66365/09, § 92, 15 October 2013).

At the same time, it is important to note that paragraphs 22 and 23 of Section XII "Final and Transitional Provisions" of the Law of Ukraine "On Judiciary and Status of Judges" (which provides for different amounts of judges' remunerations who have not passed the qualification evaluation and judges who have passed such evaluation or judges appointed for the post based on the results of the competition conducted after the Law of Ukraine "On Judiciary and Status of Judges" came into force) are excluded. In this regard, the judges' remunerations are set according to uniform rules for all judges, regardless of their qualification evaluation.

The Government consider that the measures and progress achieved in the reform of the systems of judicial discipline and careers, and in particular the adoption of the constitutional amendments and enacting legislation which provided a new comprehensive legal framework for the judiciary and the above measures respond to the requirements of general measures in *Oleksandr Volkov* groups of cases, being capable of preventing similar violations of the Convention in future.