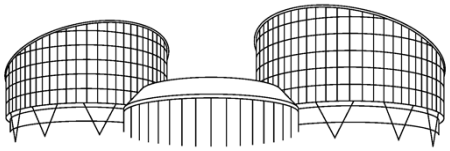

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GOLOVIN v. UKRAINE

(Application no. 47052/18)

JUDGMENT

Art 8 • Private life • Art 6 (civil) • Fair hearing • Constitutional Court judge's dismissal for participating in a debatable judgment, without clear interpretation of the imputed "breach of oath" and the scope of their functional immunity • Findings in *Ovcharenko and Kolos v. Ukraine* applied • Inadequate judicial review lacking elaborate response on crucial issues

STRASBOURG

13 July 2023

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

In the case of Golovin v. Ukraine,

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

Georges Ravarani*, President*,
Lado Chanturia,
Carlo Ranzoni,
María Elósegui,
Mattias Guyomar,
Kateřina Šimáčková,
Mykola Gnatovskyy*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 47052/18) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Anatoliy Sergiyovych Golovin ("the applicant"), on 23 September 2018;

the decision to give notice of the application to the Ukrainian Government ("the Government");

the parties' observations;

Having deliberated in private on 20 June 2023,

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

INTRODUCTION

1. The present case concerns the dismissal of a judge of the Constitutional Court of Ukraine, allegedly in breach of Articles 6, 8 and 18 of the Convention.

THE FACTS

2. The applicant was born in 1952 and, according to the most recent available information, lives in Kyiv. The applicant was represented by the late Ms O.Y. Lyoshenko, a lawyer who practised in Kyiv.

3. The Government were represented by their Agent, Mr I. Lishchyna.

4. The facts of the case may be summarised as follows.

5. In August 2006 Parliament appointed the applicant to the post of judge of the Constitutional Court of Ukraine for a non-renewable term of nine years.

6. On 24 February 2014 Parliament dismissed the applicant from his post "for breach of his judicial oath" in connection with his participation in the Constitutional Court's judgment of 30 September 2010, by the same resolution as that concerning the applicants in *Ovcharenko and Kolos v. Ukraine* (nos. 27276/15 and 33692/15, §§ 5-20, 12 January 2023).

7. On 27 February 2014 the applicant, relying on the Code of Administrative Justice, lodged a claim with the Higher Administrative Court ("the HAC"), challenging his dismissal.

8. On 3 March 2014 the applicant submitted to Parliament a statement of resignation.

9. On 17 December 2017 the HAC declared unlawful the parliamentary resolution of 24 February 2014 with respect to the dismissal of the applicant. In its decision the HAC referred to international and domestic legal principles concerning the independence of the judiciary and concluded that those principles had not been respected by Parliament. It referred in particular to the provision of the Constitutional Court Act specifying that judges could not be held liable for the results of their votes (see *Ovcharenko and Kolos*, cited above, § 41). It further found that Parliament had failed to follow the procedure for the dismissal of a judge of the Constitutional Court and there had been no indication that any individual liability of the applicant had been established.

10. Parliament lodged an appeal with the Supreme Court.

11. On 14 March 2018 the Grand Chamber of the Supreme Court quashed the HAC's judgment and dismissed the applicant's claim as unfounded. The full text of the decision was drawn up on 23 March 2018.

12. The Supreme Court found that the Constitutional Court had acted beyond its powers in its judgment of 30 September 2010 as it had in fact invalidated binding provisions of the Constitution. The Supreme Court considered that in adopting its judgment the Constitutional Court had failed to ensure the supremacy of the Constitution, had changed the Constitution and the constitutional system by violating the fundamental principles of democracy and the separation of powers, and had undermined the legitimacy of the State authorities, whose activities had since then been based on rules established by the Constitutional Court and not by Parliament. The Supreme Court concluded that the participation of the applicant in that judgment and the consequences of such participation had been manifestly inconsistent with his judicial oath.

13. The Supreme Court found that the applicant had been dismissed after a procedure which had been compatible with the Constitution and the Rules of Parliament.

14. The Supreme Court went on to note:

> "In its judgment of 9 June 2013 in the case of *Oleksandr Volkov v. Ukraine* the European Court of Human Rights (ECtHR) criticised the procedure for the imposition of disciplinary liability on judges by Parliament, before the Parliamentary Committee and at its plenary meeting. The ECtHR stated that the plenary meeting was not an appropriate forum for examining issues of fact and law, assessing evidence and making a legal characterisation of the facts. The ECtHR put in doubt the role of the politicians

sitting in Parliament who were not required to have any legal or judicial experience in determining complex issues of fact and law in such a situation.[1]

At the same time there are considerable differences between the circumstances examined by the ECtHR in that case and the circumstances of the case under examination.

According to the [relevant provisions] of the Constitution of Ukraine (as it was worded at the relevant time)[2], the Constitutional Court is composed of eighteen judges. The President of Ukraine, the *Verkhovna Rada* of Ukraine and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine.

This indicates the political nature of the process of formation of that body of constitutional jurisdiction.

Moreover, the Constitutional Court of Ukraine does not examine specific legal disputes between those who are subject to the law but rather has the power to declare legislation unconstitutional (therefore acting as a negative legislator) and to provide an official interpretation of the Constitution of Ukraine and, in accordance with the Constitution as it was worded at the relevant time, the laws (therefore acting as a positive legislator).

Such circumstances make the Constitutional Court of Ukraine considerably distinct from the courts of general jurisdiction; those circumstances indicate that it is more of a political body than a judicial one.

That the Constitutional Court of Ukraine is not a court within the meaning of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 also follows from the judgments of the European Court of Human Rights in *Fischer v. Austria* and *Zumtobel v. Austria*.[3]

In such circumstances it is entirely justified to draw the conclusion that the body that appointed a judge of the Constitutional Court of Ukraine has the right to apply measures of political accountability to the judge it has appointed where it establishes that the conduct of the judge in question does not meet the high standards expected by society of a judge of the Constitutional Court of Ukraine."

RELEVANT LEGAL FRAMEWORK AND PRACTICE

15. The relevant material can be found in *Ovcharenko and Kolos* (cited above, §§ 33-73).

[1] *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 122, ECHR 2013 (this and other footnotes are not present in the Supreme Court's decision and have been added by the Court's Registry for ease of reference).
[2] The relevant provisions can be found in *Ovcharenko and Kolos* (cited above, § 33).
[3] *Fischer v. Austria*, 26 April 1995, § 29, Series A no. 312; *Zumtobel v. Austria*, 21 September 1993, § 30, Series A no. 268-A.

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 6 AND 8 OF THE CONVENTION

16. The applicant complained that (i) the case relating to his dismissal had not been examined by an "independent and impartial tribunal"; (ii) his case had not been examined by "a tribunal established by law" given that the authorities dealing with his case had gone beyond their jurisdiction; (iii) the right to a reasoned decision had not been respected; and (iv) the principle of legal certainty had not been observed given that no time-limits existed for imposing liability for "breach of oath". He relied on Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

17. The applicant also complained that he had been dismissed unlawfully and that his right to respect for his private life had been violated. He relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

18. The applicant and the Government made submissions in the same vein as those made in *Ovcharenko and Kolos v. Ukraine* (cited above, §§ 77-80, 88-90 and 115-19).

19. The Government notably submitted, as they did in *Ovcharenko and Kolos* (cited above, §§ 77 and 78) that the applicant's failure to inform the Court of his resignation application amounted to abuse of the right of application and the fact that he had requested resignation rendered his complaint under Article 8 pointless.

20. The Government also stressed the context in which the case had arisen, notably the problematic nature of the Constitutional Court's judgment of 30 September 2010 (see similar submissions in *Ovcharenko and Kolos*, cited above, § 90). They also submitted that the grounds and procedure for the applicant's dismissal had complied with domestic legislation and had not resulted in a violation of the applicant's rights.

21. The applicant contested those submissions, arguing notably that a "breach of oath" by him had never been established in accordance with the law. Domestic law did not allow the imposition of a measure of liability on Constitutional Court judges for positions taken by them in that court's judgments (see similar submissions in *Ovcharenko and Kolos*, cited above, § 88).

B. The Court's assessment

22. The Court notes that there is no indication of abuse of the right of individual application and that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds (compare ibid., § 77-87). They must therefore be declared admissible.

23. The applicant's situation and the domestic decisions in his case are nearly identical to those concerning the applicants in *Ovcharenko and Kolos* (cited above).

24. A slight difference can nevertheless be observed in that, in its judgment concerning Mr Golovin, the Supreme Court sought to distinguish the applicant's case from that of *Oleksandr Volkov v. Ukraine* (no. 21722/11, ECHR 2013) by characterising the Constitutional Court as a primarily political body rather than as a court within the meaning of Article 6 of the Convention (see paragraph 14 above).

25. The Court notes the Supreme Court's effort to engage with the Court's relevant case-law. However, it cannot agree with the Supreme Court's characterisation of the issue. The Supreme Court, while making a general statement about the Constitutional Court being primarily a political body, did not comment on how that applied specifically in the applicant's case, given that he had been dismissed specifically for breach of his *judicial* oath.

26. In *Ovcharenko and Kolos* (cited above, §§ 98-100) the Court acknowledged that there existed some difference between the legal framework applicable to the Constitutional Court judges and that applicable to judges of other courts (including the Supreme Court, such as the applicant in *Oleksandr Volkov*). However, it concluded that at the relevant time the legal framework concerning Constitutional Court judges had not offered significantly better foreseeability, by comparison with that for other judges, on the question of what conduct by a judge would constitute "breach of oath" under Ukrainian law.

27. The legal framework in issue is identical in the present case. Nothing in the present case or in the domestic decisions allows the Court to reach a different conclusion from that which it reached in *Ovcharenko and Kolos* (cited above, §§ 101-10), namely that the framework in question lacked the requisite clarity and foreseeability and that the domestic decisions applying it in the applicant's case were not sufficiently reasoned.

28. Notably, in that judgment, the Court pointed out that Section 28 of the Constitutional Court Act established functional immunity for Constitutional Court judges by stating that they would not be held legally liable for the results of their votes in that court. Having regard to the fact that Mr Ovcharenko and Mr Kolos (like Mr Golovin – see paragraph 6 above) were dismissed precisely for the results of their votes on the judgment of 30 September 2010, the question whether that provision of the Act was to be interpreted as limiting the scope of liability of those judges for "breach of oath" was of crucial importance and required detailed analysis. However, no clarification on these questions was available at the relevant time in case-law or another authoritative source (*Ovcharenko and Kolos*, cited above, §§ 101 and 102).

29. While very detailed and clear analysis was normally needed to demonstrate, in such circumstances, that all relevant arguments were taken into consideration in the application of the Constitution and the law, no such analysis was provided by Parliament or the Supreme Court (ibid., § 103).

30. Those considerations are also fully relevant in the present case.

31. In such circumstances, and while reiterating that it is aware of the particular context of the situation in issue and the debatable nature of the judgment in respect of which the applicant was dismissed (ibid., §§ 107 and 109), the Court finds that there has been a violation of Article 8 of the Convention.

32. In *Ovcharenko and Kolos* (cited above, §§ 120-27), the Court also held that there was a violation of Article 6 § 1 of the Convention as regards the right to a reasoned judgment.

33. The Court noted, in particular, that the case concerned the accountability of two judges before a political body which did not act as a preliminary authority but exercised conclusive decision-making power resulting in the applicants' dismissal. As that use of power was not preconditioned by any assessment of the matter by an independent authority, the *ex post* judicial review of the case was of crucial significance in the global assessment of the compatibility of the domestic proceedings with Article 6 § 1 (ibid., § 122).

34. In the course of that review the question whether the applicants' dismissal was compatible with the constitutional guarantees of judicial independence, including the question of functional immunity of Constitutional Court judges limiting the scope of their legal liability for the results of their votes as members of the Constitutional Court, called for an elaborate response. As such a response was not provided, the decisions on the applicants' dismissal could not be considered sufficiently reasoned (ibid., § 126).

35. The Supreme Court's decision in the applicant's case cannot be considered sufficiently reasoned for the same reasons.

36. There has, accordingly, been a violation of Article 6 § 1 of the Convention as regards the right to a reasoned judgment.

37. As in *Ovcharenko and Kolos*, the Court also sees no need to examine the other deficiencies complained of by the applicant (ibid., § 126).

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

38. The applicant further complained that he had had no effective remedies in respect of his unlawful dismissal. He relied on Article 13 of the Convention, which provides as follows:

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

39. The Court considers that the complaint is admissible. However, given the Court's findings under Articles 6 and 8 of the Convention, it does not give rise to any separate issue (see *Oleksandr Volkov*, cited above, § 189).

40. Consequently, the Court holds that it is not necessary to examine the complaint under Article 13 of the Convention separately.

III. ALLEGED VIOLATION OF ARTICLE 18 TAKEN IN CONJUNCTION WITH ARTICLES 6 AND 8 OF THE CONVENTION

41. Relying on Articles 6, 8 and 18 of the Convention, the applicant complained that his dismissal had had a purpose other than that stated by the authorities. Article 18 reads as follows:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

42. The Court sees no material difference between the facts and issues relevant to the above complaint and those examined by it in detail in *Ovcharenko and Kolos* (cited above). For the reasons set out in that judgment (ibid., §§ 131-36), the Court considers that this complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. 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."

44. The applicant claimed 2,100,000 Ukrainian hryvnias (UAH) in respect of pecuniary damage, representing his lost wages and other remuneration.

45. In support of that claim he provided a certificate showing that the annual salary of another Constitutional Court judge, Mr B., for the period from July 2016 to June 2017 was UAH 666,674.60 before tax and UAH 536,673.05 after tax. According to the applicant, Judge B. had been appointed of the same term of office as the applicant. On this basis, the applicant claimed: UAH 545,000 for years 2014, 2015 and 2016 each and UAH 395,000 for 2017.

46. The applicant also claimed 20,000 euros in respect of non-pecuniary damage.

47. The Government contested those claims, considering them unfounded and exaggerated. They pointed out in particular that during the relevant period Judge B. had served as President of the Constitutional Court, whereas the applicant had been dismissed from his position as an ordinary judge of that court.

48. The Court notes that in *Ovcharenko and Kolos* (cited above, § 140) it rejected the applicants' claims for pecuniary damage as they did not provide relevant evidence in respect of their claims.

49. Unlike the applicants in that case, the applicant in the present case did provide some evidence in support of his claim. However, that evidence related not to his own income prior to and after his dismissal but rather to Judge B.'s income during a one-year period several years after the applicant's dismissal.

50. The applicant argued, without explaining why he made that argument, that he should be awarded an amount roughly similar to Judge B.'s 2016/2017 salary for the entire period from 2014 to 2017. The applicant failed to explain why he made claims in respect of all 2014, even though he was dismissed only at the end of February of that year, or for 2016 and 2017, even though his own term of office was scheduled to expire in 2015 (see paragraph 5 above). The applicant also failed to explain why he claimed UAH 545,000 per year even though Judge B. earned either more or less than that amount, depending on whether taxes were taken into account (see paragraph 45 above).

51. In addition to the unexplained discrepancies in dates and amounts, Judge B. was, in the relevant period, president of the Constitutional Court while the applicant was dismissed from the position of a judge of that court.

52. In summary, the applicant failed to provide to the Court any coherent and relevant information on which calculation of his lost income could be made.

53. Moreover, the applicant did not provide any detailed information or evidence concerning his own situation and income following his dismissal. In this respect the Court finds it relevant to recall its observations in *Kulykov*

and Others v. Ukraine (nos. 5114/09 and 17 others, § 155, 19 January 2017) which are largely pertinent also in the present case:

> "154. The applicants based their calculation on the assumption that they would work until retirement age, after which they would be entitled to a pension. However, various eventualities impairing that assumption (for example, incapacity to work, dismissal, demotion, change of salary or pension rates) were not considered. Secondly, following dismissal the applicants were not prevented from taking up new employment, even though their dismissal records imposed certain limitations and might have had a negative impact on their prospects of finding new jobs. Meanwhile, the income received after the dismissal, as a result of new employment or obtained otherwise, would have to be examined and taken into account when determining the amount of pecuniary loss actually caused by the dismissal..."

54. Based on those considerations, in *Kulykov and Others* the Court granted, in part, the claim for pecuniary damage of only one applicant out of eighteen and dismissed the claims of the others (ibid., § 155). The same considerations also militate in favour of rejecting the applicant's pecuniary damage claim here.

55. In view of the above considerations, the Court rejects the applicant's claim in respect of pecuniary damage.

56. As regards non-pecuniary damage, the Court considers that, in the circumstances of the case, a finding of violations of Article 8 and Article 6 § 1 in itself constitutes adequate just satisfaction for the purposes of Article 41 of the Convention (see *Ovcharenko and Kolos*, cited above, § 141).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 6 § 1, Article 8 and Article 13 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the right to a reasoned judgment;

4. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;

5. *Holds* that the finding of a violation is sufficient just satisfaction for any non-pecuniary damage suffered by the applicant and dismisses the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 July 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President