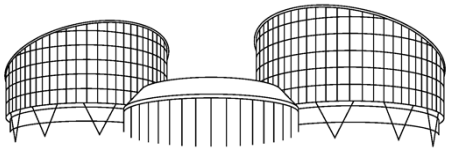

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GUMENYUK AND OTHERS v. UKRAINE

(Application no. 11423/19)

JUDGMENT

Art 6 § 1 (civil) • Disproportionate restriction on access to a court of former Supreme Court of Ukraine judges unable to contest the prevention from exercising their judicial functions after legislative reform • Art 6 applicable under its civil head • Second condition of the *Eskelinen* test not met • Impossibility for judges to uphold the rule of law and give effect to the Convention if domestic law deprived them of its guarantees on matters directly touching their individual independence and impartiality • Unjustified exclusion of judiciary members from the protection of Art 6 in matters concerning employment conditions on the basis of special bond of loyalty and trust to the State • Possibility of institutional action not a replacement for a judge's right to bring action in personal capacity
Art 8 • Private life • Unlawful interference with the applicants' exercise of judicial functions as Supreme Court judges after liquidation of the Supreme Court of Ukraine • Constitutional Court's findings as to unconstitutionality of legislative measures and their inconsistency with principle of irremovability of judges of significant weight • Clear lack of coordination in addressing applicants' situation for a considerable period seriously undermined legal certainty and predictability of constitutional principles on judicial independence

STRASBOURG

22 July 2021

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 Gumenyuk and others v. Ukraine,

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

Síofra O'Leary, *President,*
Mārtiņš Mits,
Ganna Yudkivska,
Lətif Hüseynov,
Jovan Ilievski,
Lado Chanturia,
Mattias Guyomar, *judges,*
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the application (no. 11423/19) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eight Ukrainian nationals ("the applicants"), whose particulars are set out in the appended table;

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

the parties' observations;

Having deliberated in private on 25 May and 29 June 2021,

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

INTRODUCTION

1. The present case concerns judges of the Supreme Court of Ukraine who complain that they were unlawfully prevented from exercising their judicial functions as a result of the judicial reform and legislative amendments in 2016. In this connection the applicants complain that their right of access to a court under Article 6 § 1 and their right to respect for private life under Article 8 were violated.

THE FACTS

2. The applicants were represented by Ms O. Lyoshenko, a lawyer practising in Kyiv.

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

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

5. On dates between 1994 and 2008, the applicants were elected to the posts of judges of the Supreme Court of Ukraine (hereafter "the SCU") for an indefinite period.

I. LEGISLATIVE AMENDMENTS IN 2016 RESTRUCTURING THE SYSTEM OF HIGH COURTS IN UKRAINE

6. The background to this case are the Maidan protests in 2013-2014 which resulted in the departure of the former President and change of power in Ukraine. In late November 2013 large anti-government demonstrations commenced in Kyiv and then spread to other cities in Ukraine. By late February 2014 the demonstrations had escalated to serious clashes between protesters and law-enforcement authorities, causing numerous injuries and deaths (for further details, see *Shmorgunov and Others v. Ukraine*, nos. 15367/14 and 13 others, §§ 9-17, 21 January 2021). During these events certain judges of lower level jurisdictions were considered to have taken arbitrary decisions to detain demonstrators (ibid, §§ 468-470 and 477), decisions which were part of a larger strategy in relation to protesters which had started peacefully and which involved many peaceful protesters (ibid., § 476). According to the Government, by the end of those events, the judiciary turned into the least trusted public institution and the judicial reform was therefore one of the most expected in the society.

7. The Government further submitted that in 2015 the President of Ukraine initiated the work on a strategy for reform of the judiciary which included both modernisation of legislation and adoption of amendments to the Constitution of Ukraine. The draft amendments to the Constitution were discussed with the Venice Commission. In their Opinion CDL-AD(2015)027 of 26 October 2015 the Venice Commission upheld the proposed amendments to the Constitution regarding the judiciary (see paragraph 34 below).

8. On 2 June 2016 Parliament adopted amendments to the Constitution of Ukraine with regard to the rules governing the organisation and functioning of the domestic judiciary (Act no. 1401 which came into effect on 30 September 2016). According to the new wording of Article 125 § 3 of the Constitution, "the Supreme Court" (hereafter "the SC") is the highest court in the Ukrainian judicial system.

9. Simultaneously with the amendments to the Constitution, Parliament adopted a new law "On Judiciary and Status of Judges" on 2 June 2016 (Act no. 1402, "the Judiciary Act 2016") which came into effect on 30 September 2016. According to the explanatory note to the draft law, the bill was intended, among other things, to optimise the judicial system and to introduce appropriate mechanisms for renewing judicial staff in order to meet the social demand for the fair judiciary in Ukraine. The explanatory note specified that the draft law sought to increase the professional standards of the judiciary, limiting the immunity of judges to the functional one, ensuring continuous and efficient operation of the judiciary for the transition period. According to the explanatory note, the Supreme Court would be established as a new body where judges would be appointed on

a competitive basis. The function of ensuring the stability and coherence of judicial practice would be concentrated in a single supreme judicial authority. Reducing the number of court levels in the judicial system would simplify and speed up court proceedings.

10. In contrast to the previous legislation, according to which the SCU did not have the powers of cassation review (those had been transferred to the higher specialised courts as a result of earlier judicial reform), the Judiciary Act 2016 provides that the SC shall, among other powers, again exercise the function of cassation review (section 36 § 2) and that it shall be composed of the Grand Chamber, the Administrative Cassation Court, the Commercial Cassation Court, the Criminal Cassation Court and the Civil Cassation Court (section 37 § 2). The Judiciary Act 2016 also introduced a new method for determining judicial salaries which resulted in higher salaries for judges.

11. Chapter XII of the Judiciary Act 2016, entitled "Final and transitional provisions", provides *inter alia* that the SC shall be established and that the judges of the SC shall be appointed based on the results of a competition (§ 4); the existing SCU and three courts of cassation shall operate within their powers defined by procedural law until the SC starts functioning and the relevant procedural legislation governing the proceedings at the SC takes effect (§ 6); the existing SCU and three courts of cassation shall cease operating and shall be subject to liquidation in accordance with the procedure established by law (§ 7); and the judges of the courts that are subject to liquidation (including the SCU) shall have the status, the rights and the guarantees as determined by the previous law on the status of judges (§ 7) and the right to participate in the competition for the SC (§ 14).

12. On 3 October 2016 the plenary SCU challenged the provisions of the Judiciary Act 2016 before the Constitutional Court, in so far as the termination of SCU's activity and the establishment of the new SC were concerned. The SCU argued, among other things, that prevention of judges from exercising their judicial functions by way of liquidation of the SCU would be contrary to the Constitution.

13. On 7 November 2016 the Higher Qualification Commission of Judges ("the HQCJ") announced a competition for 120 judges' posts for the SC. 846 candidates participated in the competition. Among the candidates, there were 17 judges of the SCU (at the relevant time there were 21 judges at the SCU). All the applicants, except for the second applicant, participated in the competition but none of them succeeded.

14. Following the competition, new judges were selected and appointed to the SC. On 15 December 2017 the SC started functioning.

15. On 21 June 2018 the State registrar entered information in the State register on legal entities that the SCU was in the process of being liquidated. The first applicant, acting on behalf of the SCU, challenged that measure

but on 8 November 2018 the Kyiv Circuit Administrative Court refused to entertain the claim for lack of the first applicant's standing and suggested that he was free to initiate proceedings in his personal capacity. On 11 March 2019 and 30 March 2020 respectively, the Sixth Administrative Court of Appeal and the SC upheld that ruling.

16. On 2 August 2018 the HQCJ announced a second competition for another seventy-eight judges' posts for the SC. The competition was concluded in 2019. Five members of the High Council of Justice (hereafter "the HCJ") applied and four of them eventually succeeded.

17. On 18 February 2020 the Constitutional Court examined the case initiated on 3 October 2016 by the plenary SCU. The Constitutional Court found that under the Constitution only one supreme judicial body existed and that it had been renamed from the "Supreme Court of Ukraine" to "Supreme Court". It further found that, in view of the principle of the irremovability of judges, the judges of the "old" SCU should continue performing their functions as judges of the "new" SC. The relevant extracts from the judgment read as follows:

> "7. The systemic analysis of the Constitutional provisions "the highest judicial body in the system of courts of general jurisdiction" and "the highest court in the system of Ukrainian judiciary" in conjunction with the provisions of the laws of Ukraine on judiciary and judicial procedure gives the Constitutional Court grounds to assert that the removal of the word "Ukraine" - the name of the State - from the phrase "Supreme Court of Ukraine" did not affect the constitutional status of this body of state power.
> ...
>
> The systemic analysis of the amendments to the Constitution, introduced by the Act no. 1401, indicates that they were not aimed at terminating the activity and liquidation of the Supreme Court of Ukraine as a body of state power by removing the word "Ukraine" - the name of the State - from the phrase "Supreme Court of Ukraine".
>
> The Constitutional Court considers that the Act no. 1401 did not violate the principle of the institutional continuity of the highest body in the judiciary, which, after the entry into force of the Act no. 1401, continues to operate under the name "Supreme Court".
>
> ...
>
> 13. Comparative analysis of the provisions of the Constitution before and after the amendments of the Act no. 1401, the provisions of the Law "On the Judiciary and Status of Judges" dated July 7, 2010, and the Act no. 1402 gives the Constitutional Court grounds to conclude that there is no difference between the legal status of a judge of the Supreme Court of Ukraine and a judge of the Supreme Court.
>
> The Constitutional Court notes that renaming of a body envisaged in the Constitution of Ukraine – the Supreme Court of Ukraine – cannot take place without the transfer of judges of the Supreme Court of Ukraine to the offices of judges of the Supreme Court, since there is no difference between the legal status of a judge of the Supreme Court of Ukraine and a judge of the Supreme Court, the removal of the word "Ukraine" – the name of the State – from the phrase "the Supreme Court of Ukraine" cannot be the grounds for dismissal of all judges of the Supreme Court of Ukraine or their transfer to another court, all the more so to a lower court.

Judges of the Supreme Court of Ukraine must continue to exercise their powers as judges of the Supreme Court. Therefore, making a difference between judges of the Supreme Court of Ukraine and those of the Supreme Court is not consistent with the principle of irremovability of judges, which is a part of the constitutional guarantee of the independence of judges.

...

Thus, ... the Constitutional Court of Ukraine rules that:

...

2. The provisions of paragraph 7 "and shall be liquidated" as regards the Supreme Court of Ukraine, paragraph 14 "judges of the Supreme Court of Ukraine" ... of Section XII "Final and transitional provisions" of the Law of Ukraine "On the Judiciary and Status of Judges" of 2 June 2016, are not in conformity with the Constitution of Ukraine (unconstitutional).

..."

18. In June 2020, draft law no. 3711 was introduced in Parliament proposing that the judges of the SCU be enrolled in the staff of the SC. As of June 2021, this law has not yet been adopted and the applicants have not been able to resume their duties as Supreme Court judges. The Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe provided their comments on the draft law (see paragraph 35 below).

19. According to the Government, the Liquidation Commission of the SCU regularly offered to pay all the salaries to the applicants according to the amounts determined on the basis of the previous law on the status of judges, as prescribed by transitional provisions of the Judiciary Act 2016. The Liquidation Commission made the amounts of their salaries available to the applicants and informed them about that. According to the information available to the Court, the applicants however did not appear to collect those amounts.

II. ATTEMPTED TRANSFER OF THE APPLICANTS TO THE OTHER COURTS

20. On 20 June 2018 the HQCJ issued recommendations for transferring the applicants to various appellate courts.

21. One of the applicants (Ms G. Kanygina) lodged a claim against the HQCJ, challenging the recommendation concerning her transfer. On 27 August 2018 the SC, acting as the first-instance court, rejected the claim as inadmissible considering that it had not been open to Ms Kanygina to appeal against the recommendation in view of the fact that the High Council of Justice ("the HCJ") had not yet taken its decision on the basis of that recommendation. On 6 February 2019 the Grand Chamber of the SC upheld that ruling.

22. On 20 and 29 November 2018 the HCJ rejected the above-mentioned recommendations without considering them on the merits, noting that the appellate courts in question had ceased to operate due to restructuring. At the time when that decision was taken, five members of the HCJ were taking part in the second competition to the new SC (see paragraph 16 above) and another member of the HCJ was the President of the new SC.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine, 1996

23. According to the Constitution, new laws or acts amending existing laws may not narrow the content and scope of existing Constitutional rights and freedoms (Article 22 § 3). Everyone has the right to work, which includes earning a living by performing work of one's free choice or free will (Article 43 § 1). Everyone is guaranteed the right to appeal in court against decisions, actions or omissions of public authorities, local governments and officials (Article 55 § 1).

24. Article 126 of the Constitution (in the wording before the amendments of 2016) provided that judges held their posts for an indefinite term except for the judges of the Constitutional Court and those judges who were appointed for the first time for the period of five years. The same provision provided for the following exhaustive list of grounds for the dismissal of judges: (1) expiration of the term for which the judge was elected or appointed; (2) reaching the age of sixty-five; (3) inability to perform judicial duties resulting from health problems; (4) violation by a judge of the incompatibility requirements; (5) breach of the judicial oath; (6) criminal conviction; (7) termination of citizenship; (8) death or a decision declaring a judge missing or dead; and (9) resignation.

25. After the amendments of 2016, Article 126 similarly proclaims the principle that judges hold their posts for an indefinite term (Article 126 § 5) and provides for an exhaustive list of grounds for the dismissal of judges and the termination of their office which includes a refusal by a judge to be transferred to a different court in the event of the liquidation or reorganisation of the court where the judge was employed (Article 126 § 6 (5)).

26. According to Article 131 of the Constitution (as amended in 2016), the HCJ shall consist of twenty-one members, elected or appointed as follows: ten by the Congress of Judges from among judges or retired judges, two by the President of Ukraine, two by the Parliament, two by the Congress of Advocates of Ukraine, two by the All-Ukrainian Conference of Prosecutors, and the remaining two by the Congress of

representatives of legal higher education institutions and scientific institutions. The Head of the SC shall be an *ex officio* member of the HCJ.

B. Code of Administrative Justice, 2005

27. Article 5 of the Code of Administrative Justice provides that everyone claiming that a decision, action or inaction of a public authority violates his or her rights, freedoms or legitimate interests has the right to apply to the administrative courts in accordance with the procedure established by that Code.

C. Judiciary and Status of Judges Act, 2016 ("the Judiciary Act 2016")

28. Section 53 of the Judiciary Act 2016 provides that a judge may not be transferred to another court without his or her consent, except for (1) transfers in case of reorganisation, liquidation or cessation of the functioning of a court; (2) transfer as a disciplinary sanction.

D. High Council of Justice Act, 2016

29. According to the High Council of Justice Act, the question of transfer of a judge from one court to another shall be decided by the HCJ: (1) on the basis and within the limits of a recommendation by the HQCJ and the materials attached to it; or (2) on the basis of a report of the Disciplinary Chamber of the HCJ on the transfer of a judge to a lower court by way of disciplinary sanction (section 70). The issue of transferring a judge from one court to another shall be considered at a hearing of the HCJ (section 71 § 1) to which the judge concerned shall be invited. However, the absence of the judge concerned from the hearing, regardless of the reasons, does not preclude consideration of the issue in their absence (section 71 § 2). The recommendation of the HQCJ or the report of the Disciplinary Chamber of the HCJ must be read out at the beginning of the hearing (section 71 § 3). The HCJ shall adopt a reasoned decision (section 71 § 4) that can be appealed against. The court examining the appeal shall annul HCJ's decision if, among other grounds, it does not state the grounds for the transfer, as determined by law, or the reasons for the HCJ's conclusions (section 72).

II. INTERNATIONAL MATERIAL

30. In its General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights (Right to equality before courts and

tribunals and to a fair trial) published on 23 August 2007, the UN Human Rights Committee stated as follows (footnotes omitted):

> "20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law."

31. The relevant extracts from the European Charter on the Statute for Judges (Department of Legal Affairs of the Council of Europe, 8-10 July 1998 DAJ/DOC (98)23) read as follows:

> "1.1. The statute for judges aims at ensuring the competence, independence and impartiality which every individual legitimately expects from the courts of law and from every judge to whom is entrusted the protection of his or her rights. It excludes every provision and every procedure liable to impair confidence in such competence, such independence and such impartiality. The present Charter is composed hereafter of the provisions which are best able to guarantee the achievement of those objectives. Its provisions aim at raising the level of guarantees in the various European States. They cannot justify modifications in national statutes tending to decrease the level of guarantees already achieved in the countries concerned.
>
> 1.2. In each European State, the fundamental principles of the statute for judges are set out in internal norms at the highest level, and its rules in norms at least at the legislative level.
>
> 1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.
>
> 1.4. The statute gives to every judge who considers that his or her rights under the statute, or more generally his or her independence, or that of the legal process, are threatened or ignored in any way whatsoever, the possibility of making a reference to such an independent authority, with effective means available to it of remedying or proposing a remedy.
>
> ...
>
> 3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof."

32. The relevant extract from the Explanatory Memorandum to the European Charter on the Statute for Judges (mentioned above) provides as follows:

> "3.4 The Charter enshrines the irremovability of judges, which means that a judge cannot be assigned to another court or have his or her duties changed without his or her free consent. However, exceptions must be allowed where transfer is provided for within a disciplinary framework, when a lawful re-organization of the court system takes place involving for example the closing down of a court or a temporary transfer is required to assist a neighbouring court. In the latter case, the duration of the temporary transfer must be limited by the relevant statute. Nevertheless, since the problem of transferring a judge without his or her consent is highly sensitive, it is recalled that under the terms of paragraph 1.4 he or she has a general right of appeal before an independent authority, which can investigate the legitimacy of the transfer. In fact, this right of appeal can also remedy situations which have not been specifically catered for in the provisions of the Charter where a judge has such an excessive workload as to be unable in practice to carry out his or her responsibilities normally."

33. The relevant extracts from the appendix to Recommendation CM Rec (2010)12 of the Committee of Ministers of the Council of Europe to member States on judges' independence, efficiency and responsibilities, adopted on 17 November 2010, read:

> "Tenure and irremovability
>
> ...
>
> 49. Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.
>
> ...
>
> 52. A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system.
>
> ..."

34. The following are extracts from the European Commission for Democracy through Law (Venice Commission) Opinion on the proposed amendments to the Constitution of Ukraine regarding the judiciary as approved by the Constitutional Commission on 4 September 2015, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015):

> "36. In their joint opinion "on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine", the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law had indeed taken note of the Ukrainian authorities' explanation that a choice needed to be made between dismissing all the judges and inviting them to reapply for their position or assessing them in the manner proposed in the law. The Venice Commission and the Directorate expressed the view that "it may be both necessary and justified to take extraordinary

measures" to remedy "corruption and incompetence among the judiciary which are a result of political influence on judges' appointments in the previous period" but that "dismissal of every member of the judiciary appointed during a particular period would not be an appropriate solution to the problems indicated by the authorities". They stressed in addition that even "the qualification assessment as provided for in transitional Article 6 should be regarded as wholly exceptional and be made subject to extremely stringent safeguards to protect those judges who are fit to occupy their positions" and that "the matter needs to be dealt with in a substantive legal provision in much more detail and requires constitutional underpinning". Finally, the Venice Commission and the Directorate called for "harmonisation with the lustration process".

...

39. In the view of the Venice Commission, the latest version of the constitutional amendments prepared by the Working Group on the Judiciary of the Constitutional Commission of Ukraine is very positive and well-drafted, and deserves to be fully supported."

35. The Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, in their Joint Opinion on the draft amendments to the law 'On the Judiciary and the Status of Judges' and certain laws on the activities of the Supreme Court and judicial authorities (draft law no. 3711), adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020) observed as follows:

"**5. Integration of the Judges of the Supreme Court of Ukraine into the Supreme Court**

58. Clause 7 of Section XII "Final and transitional provisions" of draft Law no. 3711 transfers the remaining eight judges of the 'old' Supreme Court of Ukraine to the Supreme Court.

59. In order to implement the decision 2-p/2020 of Constitutional Court of 18 February 2020, there is indeed an urgent need to resolve the issue of the alignment of the Supreme Court. The Constitutional Court held that in the 2016 reform, the old "Supreme Court of Ukraine" was only renamed "Supreme Court" and no new court was created. This is a coherent argument avoiding the existence of two parallel courts. There must indeed be continuity between the 'old' and the 'new' Court, not least to ensure that the Supreme Court can refer to the case-law of the former Supreme Court of Ukraine. The lack of a de-registration of the old Supreme Court of Ukraine was clearly not a useful step. The decision of the Constitutional Court corrects that error. In general, what matters is the situation as set out in the law, not the formal registration of a legal entity, which nevertheless should be corrected. It is up to the Ukrainian authorities to find a solution within the framework of the decision of the Constitutional Court, according to which there is a single supreme court."

36. Other relevant international material, including the UN Basic Principles on the Independence of the Judiciary, the decisions of the UN Human Rights Committee, the Opinions of the Consultative Council of European Judges, the Opinions of the Venice Commission, the case-law of the Inter-American Court of Human Rights, the Universal Charter of

the Judge approved by the International Association of Judges, and the International Bar Association's Minimum Standards of Judicial Independence can be found in the judgment in the case of *Baka v. Hungary* [GC] (no. 20261/12, §§ 72, 74-76, 79-87, 23 June 2016).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

37. The applicants raised two complaints under that provision. First, they complained that they did not have access to a court to challenge their alleged unlawful prevention from exercising their judicial functions as a result of legislative amendments in 2016. Secondly, they complained that in 2018, when dealing with the issue of their attempted transfer to other judicial posts, the HCJ failed to act as an "independent and impartial tribunal".

38. The applicants relied on Article 6 § 1 of the Convention which reads, in so far as relevant, as follows:

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. Alleged violation of right of access to a court as a result of the 2016 legislative amendments

1. Admissibility

(a) The parties' submissions

39. The Government submitted that Article 6 was not applicable to the applicants' complaint of lack of access to court because there was no civil right at stake in view of the public nature of their employment; moreover, the lack of a judicial remedy to challenge the applicants' removal from their judicial duties had been justified under the *Eskelinen* test. In that regard the Government noted that the legislative amendments providing for the liquidation of the SCU had been adopted in order to carry out an overall judicial reform and that all the judges of the new SC had had to go through the filter of a rigorous competition.

40. The Government further argued that all the applicants had failed to exhaust domestic remedies in respect of their complaint of lack of access to court since they had not challenged the liquidation procedure of the SCU. The proceedings initiated by the first applicant on behalf of the SCU, and not in his personal capacity (see paragraph 15 above), had been devoid of any prospect of success and were irrelevant. The Government submitted

however that in so far as the applicants' complaint concerned legislative measures, the applicants had not had a remedy against a parliamentary law.

41. The Government then submitted that the second applicant had not complied with the six-month rule under Article 35 § 1 of the Convention. They noted that the second applicant had not participated in the competition for the new SC which had started to function on 15 December 2017 (see paragraph 14 above). If she had considered that the establishment of the new SC had been in violation of her rights, she should have applied to the Court within six months of the date when the alleged violation had taken place.

42. The applicants maintained their complaints and submitted that the situation complained of was of a long-term nature and that they had no effective remedy. Accordingly, their complaints could not be dismissed on the grounds of failure to comply with the six-month rule or the rule of exhaustion of domestic remedies.

(b) The Court's assessment

43. The Court wishes to make it clear at the outset that Convention does not prevent States from taking legitimate and necessary decisions to reform the judiciary. The Court is aware of the complicated background and context of the impugned judicial reform in Ukraine and considers that it is not its role to pronounce on its goals and appropriateness or determine whether it was justified under Ukrainian constitutional law. As highlighted by the Venice Commission (see paragraph 34 above), it may be necessary and justified to take extraordinary measures in order to remedy corruption and incompetence among the judiciary. However, the Court must examine whether the applicants' rights under the Convention were affected by the manner in which the reform was actually implemented. In this regard, the first question arises whether Article 6 applies to the present case.

(i) Applicability of Article 6

(1) Existence of a right

44. The Court reiterates that for Article 6 § 1 in its civil limb to be applicable, there must be a "dispute" regarding a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether it is protected under the Convention. The dispute must be "genuine" and "serious"; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise and finally, the result of the proceedings must be "directly decisive" for the right in question, mere tenuous connections or remote consequences are not sufficient to bring Article 6 § 1 into play (see *Baka*, cited above, § 100 and *Denisov v. Ukraine* [GC], no. 76639/11, § 44, 25 September 2018).

45. Article 6 § 1 does not guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Roche v. the United Kingdom* [GC], no. 32555/96, § 117, ECHR 2005-X). The starting-point must be the provisions of the relevant domestic law and their interpretation by the domestic courts (ibid., § 120; see also *Károly Nagy v. Hungary* [GC], no. 56665/09, § 62, ECHR 2017, and *Regner v. the Czech Republic* [GC], no. 35289/11, § 100, 19 September 2017). The Court would need strong reasons to differ from the conclusions reached by the superior national courts by finding, contrary to their view, that there was arguably a right recognised by domestic law (see *Károly Nagy*, cited above, § 62).

46. The Court's traditional approach to determining whether there is a "right" attracting the application of Article 6 is based on the distinction between the substantive content of the right invoked and possible procedural obstacles to obtaining judicial protection thereof (see *Roche*, cited above, § 119). Whether a person has an actionable domestic claim may depend not only on the content, properly speaking, of the relevant civil right as defined under national law, but also on the existence of procedural bars preventing or limiting the possibilities of bringing potential claims to court (see *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 87, 29 November 2016). In the latter kind of case Article 6 § 1 may be applicable (see *Petko Petkov v. Bulgaria*, no. 2834/06, § 26, 19 February 2013, with further reference to *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 47, ECHR 2001-XII).

47. By implication, Article 6 remains inapplicable where it is clear beyond argument that no right exists in domestic law (see *Sultana v. Malta* (dec.), no. 970/04, 11 December 2007). Such is the case where a person's rights under the domestic legislation are limited to a mere hope of being granted a right, with the actual grant of that right depending on an entirely discretionary and unreasoned decision of the authorities (see *Regner v. the Czech Republic* [GC], no. 35289/11, § 103, 19 September 2017).

48. In determining whether there was a "right" within the meaning of Article 6 § 1, the Court needs to ascertain only if the applicants' arguments were sufficiently tenable, not whether they would necessarily have won had they had access to a court (see, *inter alia*, *Neves e Silva v. Portugal*, 27 April 1989, § 37, Series A no. 153-A). In so doing, the Court must have regard to the wording of the relevant legal provisions and to their interpretation, if any, by the domestic courts (see *Yanakiev v. Bulgaria*, no. 40476/98, § 58, 10 August 2006). Nevertheless, the concept of "civil rights and obligations" is an autonomous concept deriving from the Convention which cannot be interpreted solely by reference to

the respondent State's domestic law (see *Naït-Liman v. Switzerland* [GC], no. 51357/07, § 106, 15 March 2018). In that connection, in its assessment of whether there existed a "right" that an applicant can rely on arguable grounds, the Court takes domestic provisions as a starting point only (see, among many other authorities, *Denisov*, cited above, § 45) and may rely on international norms to assess or enhance the interpretation of the existence of a right (see, for example, *Enea v. Italy* [GC], no. 74912/01, § 101, ECHR 2009; *Boulois v. Luxembourg* [GC], no. 37575/04, § 102, ECHR 2012; and *Naït-Liman*, cited above, § 108).

49. The Court reiterates that although there is in principle no right under the Convention to hold a public post entailing the administration of justice (see *Dzhidzheva Trendafilova v. Bulgaria* (dec.), no. 12628/09, § 38, 9 October 2012; and concerning tenured judicial positions, *Baka*, cited above, § 107; *Denisov*, cited above, § 47, and *Kövesi v. Romania*, no. 3594/19, § 113, 5 May 2020), such a right may exist at the domestic level.

50. In the present case it is not disputed that all the applicants were entitled under the domestic law to remain judges until their retirement if none of the exceptional grounds for early termination of office, as set out in Article 126 of the Constitution, materialised. However, as a result of the "final and transitional provisions" of the Judiciary Act 2016 ordering the liquidation of the SCU and the establishment of the new SC and also as a result of further measures taken in order to implement the judicial reform, the applicants, while not being formally dismissed, were in fact prevented from exercising their judicial functions, at least for a certain period of time, despite what the Constitutional Court also confirmed to be the validity of their tenure.

51. The wording of the domestic provisions relating to the applicants' status (see paragraphs 23 and 24 above), could give rise to various interpretations, including that the applicants were entitled solely to remain active judges, and not necessarily to keep their posts in a particular court of law. At the time of the impugned events in 2016, there was no case law making clear the precise scope and meaning of the constitutional guarantees at issue. However, it was not disputed that the relevant constitutional principles provided the applicants at least with an arguable basis on which the right to be protected against arbitrary removal from judicial duties could be claimed (see, *matatis matandis*, *Bilgen*, cited above, § 57 in fine).

52. The Court does not find any reason to doubt that such a right existed at the domestic level. In this regard, the Court recalls that it has on many occasions emphasised the special role in society of the judiciary which, as the guarantor of justice, a fundamental value in a State governed by the rule of law, must enjoy public confidence if it is to be successful in carrying out its duties (see *Baka*, cited above, § 165, with further references). Given the prominent place that the judiciary occupies among State organs in

a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary (see *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13 and 2 others, § 196, 6 November 2018), the Court must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial independence and autonomy.

53. In this connection, the principles of international law or common values of the Council of Europe can be relied on to enhance the interpretation of domestic law as to the existence of such a right (see *Bilgen*, cited above, § 62). The Court reiterates that the consensus emerging from specialised international instruments and the practice of Contracting States may constitute a relevant consideration when it interprets the provisions of the Convention in specific cases (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 85, ECHR 2008). The Court further points out that in a number of judgments, it has used, for the purpose of interpreting the Convention, intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly, as well as norms emanating from other organs of the Council of Europe, whether supervisory mechanisms or expert bodies which do not have the function of representing States Parties to the Convention (ibid., §§ 74-75, and the cases cited therein).

54. Having regard to the Council of Europe material cited in paragraphs 31 and 33 above in a non-exhaustive manner, there is no doubt that that judges may claim, on the basis of the professional guarantees afforded to them, that the principles of independence of the judiciary and the security of tenure of judges should be fully complied with in measures affecting their status or career. Furthermore, the European Charter on the Statute for Judges, despite being non-binding on the member States, provides for a right of appeal for any judge who considers that his or her rights under the statute, or more generally independence, or that of the legal process are threatened or infringed.

55. The Court further notes that after the ruling of the Constitutional Court of 18 February 2020 the exact scope of the applicants' "right" in this context was sufficiently established and articulated under the domestic law. According to the Constitutional Court, the impugned legislative measures "[could not] be the grounds for dismissal of all judges of the Supreme Court of Ukraine or their transfer to another court, all the more so to a lower court"; it ruled that "Judges of the Supreme Court of Ukraine [had to] continue to exercise their powers as judges of the Supreme Court" (see paragraph 17 above). In providing this specific interpretation of the Constitutional guarantees, the Constitutional Court made it clear that the applicants had a right to remain judges of the highest judicial body.

56. In such circumstances, the Court finds that the applicants' dispute concerned a "right" within the meaning of Article 6. Moreover, the applicant's dispute was "genuine" and it was "serious", having regard to the role of the judicial functions which the applicants were prevented from exercising. Likewise, the dispute was "directly decisive" for the applicants' rights because it was precisely about the impossibility for the applicants to exercise their judicial profession.

(2) Civil nature of the right

– *Recapitulation of the case-law*

57. The scope of the "civil" concept in Article 6 is not limited by the immediate subject matter of the dispute. Instead, the Court has developed a wider approach, according to which the "civil" limb has covered cases which might not initially appear to concern a civil right but which may have direct and significant repercussions on a private pecuniary or non-pecuniary right belonging to an individual. Through this approach, the civil limb of Article 6 has been applied to a variety of disputes which may have been classified in domestic law as public-law disputes (see *Denisov,* cited above, § 51).

58. In cases of employment disputes concerning civil servants, the Court applies a two-tier test, which it established in its Grand Chamber judgment in *Vilho Eskelinen* (cited above – hereinafter referred to as the "*Eskelinen* test"). In order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. The mere fact that the applicant is in a sector or department which participates in the exercise of power conferred by public law is not in itself decisive. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists a "special bond of trust and loyalty" between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under

national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified (ibid., § 62).

59. The Court reiterates that an applicant may not be excluded from the protection of Article 6 of the Convention solely on account of his or her status as a judge. It recalls that in *Baka* (cited above), it confirmed the approach taken in a number of Chamber judgments that the *Eskelinen* test applied to disputes concerning judges (ibid., § 104). This covered all types of disputes, including those relating to recruitment/appointment, career/promotion, transfer and termination of service/dismissal (ibid., § 105).

– *Application of those principles to the present case*

60. In the present case the Government challenged the qualification of the applicants' dispute as "civil" within the meaning of Article 6 of the Convention. They submitted that the Liquidation Commission of the SCU had offered the applicants their usual salaries after their removal from their judicial duties, however the applicants had failed to collect them. For the Court, these facts are not decisive. The applicants' dispute was not about the renumeration but about their inability to exercise their mandate as judges which had direct bearing on the applicants' professional and personal development and the possibility to establish relationships with others, the concepts which largely fall in the area of private life under the Convention (see, for the origins, *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III, and *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B). These private-law aspects of the matter are substantial and they cannot be overweighed by the public nature of the applicants' employment (see *Denisov*, cited above, § 53 and *Bilgen v. Turkey*, no. 1571/07, § 69, 9 March 2021). Moreover, taking into account that the impugned measure had considerable effects on the applicants' professional life and the exercise of their functions as judges and that it was a unilateral measure which was neither insignificant nor a mere formality, the Court considers that it would be not only artificial but would also undermine the protection of the special role of the judiciary in society to exclude the dispute at issue from the protection of Article 6.

61. The Court will next examine whether the applicants' dispute could be excluded from the protection of Article 6 of the Convention on the basis of two conditions set out in the *Eskelinen* test. As to the first condition, notably the exclusion of access to a court for the post or category of staff in question, it has not been disputed that the applicants would generally have access to a court in respect of their claims related to their tenure, including claims about unlawful removal from office or hindrance in the exercise of their duties (see paragraph 27 above). However, the facts of the present case may not exactly fit the general pattern since the applicants were effectively prevented from exercising their judicial functions by way of a parliamentary

law reforming the judiciary. The Court has previously found in a number of cases against Ukraine that the courts of general jurisdiction in Ukraine did not have power to set aside laws as being unconstitutional and at the relevant time an individual had no right of individual petition to the Constitutional Court, which is the sole court empowered to repeal a statutory provision. Therefore, where an applicant's complaint directly concerned a statutory provision, the Court concluded that he or she had no remedy which could be considered effective (see, for example, *Zaichenko v. Ukraine (no. 2)*, no. 45797/09, § 112, 26 February 2015 with further references; see also *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 128, ECHR 2013). These considerations are equally pertinent in the present case.

62. In this context the Court notes that the substance of the applicants' dispute was raised by the plenary SCU in the proceedings before the Constitutional Court which took cognisance of the matter and subsequently delivered a judgment on the merits favourable to the applicants (see paragraph 17 above). However, the judgment of the Constitutional Court was not self-executing and the applicants were not parties to the proceedings before that court. The proceedings in the Constitutional Court were opened at the request of the plenary SCU, acting as a public authority, when it was still operational. The fact that the constitutional proceedings, directly touching the substance of the applicants' claims, were initiated by the plenary SCU in a public-law action is not therefore decisive since the applicants were unable to bring the matter to the Constitutional Court in their individual capacity as judges.

63. In their objection regarding the non-exhaustion of domestic remedies, the Government contended that the applicants should have challenged the liquidation procedure of the SCU (see paragraph 40 above). The Court considers that the Government's argument is not convincing because it has not been shown that challenging the liquidation process of a legal entity in court could restore the applicants' judicial functions which had been effectively terminated by a legislative act, not by the decisions or measures taken in the course of the liquidation proceedings.

64. The above considerations suggest that the applicants did not have a right of access to a court under national law in relation to their claim which is at issue in the present case. While this finding could prompt the Court to rule that the first condition of *Eskelinen* test referring to "express exclusion" of access to court might be satisfied, the Court does not consider it necessary to give a conclusive opinion under the first condition, since, in any event, there are grounds to rule that the second condition of *Eskelinen* test was not satisfied.

65. In assessing whether the exclusion of access to a court was based on objective grounds in the State's interest, it is not enough to establish that the civil servant in question participates in the exercise of public power or that there exists a "special bond of trust and loyalty" between the civil

servant and the State, as employer. It is for the State to show that the subject of the dispute in issue is related to the exercise of State power or that it has called into question the "special bond of trust and loyalty" between the civil servant and the State, as employer (see *Vilho Eskelinen*, cited above, § 62).

66. Given that the present case concerns members of the judiciary, the second criterion of *Eskelinen* test referring to the special bond of trust and loyalty must be read in the light of the guarantees for the independence of the judiciary. Those two notions, namely the special bond of trust and loyalty required from civil servants and the independence of the judiciary, cannot be easily reconciled. While the employment relationship between a civil servant and the State can traditionally be defined as one based on trust and loyalty to the executive branch in so far as employees of the State are required to implement government policies, the same does not hold true for the members of the judiciary, who play a different and more independent role because of their duty to provide checks on government wrong-doing and abuse of power. Their functional role for the State must therefore be understood in the light of the specific guarantees essential for judicial independence. Thus, when referring to the special trust and loyalty that they must observe, it is loyalty to the rule of law and democracy and not to holders of State power. This complex aspect of the employment relationship between a judge and the State makes it necessary for members of the judiciary to be sufficiently distanced from other branches of the State in the performance of their duties, so that they can render decisions *a fortiori* based on the requirements of law and justice, without fear or favour. It would be a fallacy to assume that judges can uphold the rule of law and give effect to the Convention if domestic law deprives them of the guarantees of the Articles of the Convention on matters directly touching their individual independence and impartiality. For these reasons, the Court does not consider it justified to exclude members of the judiciary from the protection of Article 6 of the Convention in matters concerning the conditions of their employment on the basis of the special bond of loyalty and trust to the State (see *Bilgen*, cited above, § 79 and, *mutatis mutandis*, *Kövesi,* cited above, § 124).

67. It follows that the second condition of the *Eskelinen* test has not been met. Article 6 § 1 of the Convention is therefore applicable and the Government's objection to this effect must be dismissed.

(ii) Other grounds for inadmissibility

68. The Court has dealt above with aspects of the Government's objection regarding the exhaustion of domestic remedies (see paragraph 63 above). On the basis of the considerations set out there, the Court considers that the remedy proposed by the Government – challenging the liquidation procedure in the applicants' individual capacities – was not effective for the purpose of the Convention because it could not address the substance of

the applicants' complaint which resulted from a legislative reform and provide appropriate relief (see *De Tommaso v. Italy* [GC], no. 43395/09, § 179, 23 February 2017). It follows that the applicants were not obliged to exhaust that remedy. Further noting that the Government did not suggest any other remedy which the applicants should have used, the Court dismisses the Government's objection based on the rule of exhaustion of domestic remedies. The Court further considers that the Government's objection on the grounds of six-month rule is closely linked to the substance of the applicants' complaint about access to court in respect of their claims concerning their prevention from exercising judicial functions as Supreme Court judges. The Court therefore joins the Government's objection to the merits.

69. The Court notes that the applicants' complaint concerning lack of access to court is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

70. The Court reiterates that the right of access to the courts is not absolute and may be subject to limitations that do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Markovic and Others v. Italy* [GC], no. 1398/03, § 99, ECHR 2006-XIV, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012 and *Baka,* cited above, § 120).

71. As stated above (see paragraph 52 above), given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary, the Court must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial independence and autonomy.

72. Moreover, the necessity to have in place procedural safeguards and the possibility of appeal against decisions affecting the career, including the status, of a judge is widely acknowledged because what is at stake is public trust in the functioning of the judiciary (see *Bilgen*, cited above, § 96 with further references). Restriction of the right of a member of the judiciary to contest their premature dismissal or a measure which amounts to constructive dismissal may be incompatible with the independence of the judiciary, where such measure is without any specific reason (see paragraph 30 above).

73. The Court considers that the right of access to a court is one of the fundamental procedural rights for the protection of members of the judiciary and the applicants should have in principle enjoyed the direct access to court in respect of their allegations of unlawful prevention from exercising their judicial functions. For these reasons, the possibility of institutional action, like the one which was initiated by the plenary SCU in the present case, could be a supplementary guarantee but it could not replace the right of a member of the judiciary to bring a court action in his or her personal capacity.

74. The explanatory note to the draft law on judicial reform provided that the reorganisation of high courts in Ukraine pursued the general aims of securing fair domestic judiciary and speeding up the domestic proceedings (see paragraph 9 above). It is hard to see how these aims could be achieved by restricting the applicants' access to court in relation to their claims regarding their prevention from exercising their judicial functions. In these circumstances, the Court finds that the absence of access to court was not reasonably proportionate to the legitimate aim sought.

75. The Court further notes that the legislative amendments and the institutional changes giving rise to the present dispute remained in force on the date on which the applicants lodged their application with the Court. It follows that the applicants' complaint concerned a continuing situation which persisted at the time of application (see *Nataliya Mikhaylenko v. Ukraine*, no. 49069/11, § 25, 30 May 2013) with the result that the six-month time-limit does not apply. The Government's objection based on the rule of six months should be dismissed.

76. In conclusion, the Court holds that there has been a violation of Article 6 § 1 of the Convention as regards the applicants' right of access to a court.

B. Alleged violation of the right to an independent and impartial tribunal in relation to the decisions of the HCJ of 2018

77. The Government submitted that it was unclear why the applicants considered that the refusal by the HCJ to examine the recommendations of the HQCJ to transfer them to lower courts was unfavourable. In any event, the HCJ had acted in accordance with the principles of independence and impartiality. The Government argued on these grounds that the complaint was manifestly ill-founded.

78. The applicants maintained their complaint that the HCJ could not be impartial in view of the involvement of its members in the competition for the new SC, which was ongoing at the relevant time.

79. The Court must determine whether Article 6 is applicable to the administrative proceedings before the HCJ. It recalls that Article 6 does not apply to a non-contentious and unilateral procedure which does not

involve opposing parties disputing over civil rights (see *Alaverdyan v. Armenia* (dec.), no. 4523/04, §§ 34-37, 24 August 2010, with further references).

80. In the present case the HCJ was not acting by way of disciplinary proceedings (contrast *Oleksandr Volkov,* cited above, §§ 89 and 90; and *Denisov*, cited above, §§ 66 and 67) but in the exercise of its administrative power to decide on the transfer of judges in the context of a reorganisation of the judiciary. The procedure at issue was essentially non-contentious and unilateral and it did not involve the determination of any "dispute" for the purpose of Article 6. It is relevant to observe that any decision taken by the HCJ in this procedure could be challenged before a court (see paragraph 29 above). In the Court's view, only in case of such a challenge, a "dispute" possibly attracting the applicability of Article 6 could have arisen (compare *Dzhidzheva-Trendafilova,* cited above, §§ 39 and 49). However, in the present case the domestic procedure at issue never evolved to the stage of "dispute": the HCJ refused to examine the recommendations of the HQCJ on the applicants' transfers for the reason that the courts of destination had no longer existed (see paragraph 22 above) and the applicants did not challenge those rulings.

81. The Court therefore concludes that the proceedings before the HCJ did not involve a "dispute" and consequently Article 6 was not applicable. The complaint is therefore incompatible *ratione materiae* with the Convention and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

82. The applicants complained under Article 8 of the Convention that their prevention from exercising their judicial functions amounted to an unlawful and groundless interference with their right to respect for private life.

83. Article 8 of the Convention 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. Admissibility

84. The Government submitted that the measures complained of were taken in the context of a general reform of the judiciary without any personal reasons given against the applicants. It was therefore

the consequence-based approach that could bring the matter within the ambit of Article 8 (see *Denisov*, cited above, § 102). However, the impugned measures did not result in the loss of the applicants' salaries as the Liquidation Commission of the SCU had offered to pay their salaries to the applicants and they had failed to collect them. Neither were the applicants seriously cut off from their circle of communication with the outer world, nor had their personal reputation been affected. In these circumstances the requisite level of severity had not been reached and Article 8 had not been applicable.

85. The applicants maintained that their complaint was admissible.

86. The Court reiterates that employment-related disputes are not *per se* excluded from the scope of "private life" within the meaning of Article 8 of the Convention. There are some typical aspects of private life which may be affected in such disputes by dismissal, demotion, non-admission to a profession or other similarly unfavourable measures. These aspects include (i) the applicant's "inner circle", (ii) the applicant's opportunity to establish and develop relationships with others, and (iii) the applicant's social and professional reputation. There are two ways in which a private-life issue would usually arise in such a dispute: either because of the underlying reasons for the impugned measure (in that event the Court employs the reason-based approach) or – in certain cases – because of the consequences for private life (in that event the Court employs the consequence-based approach) (see *Denisov v. Ukraine* [GC], no. 76639/11, § 115, 25 September 2018). If the consequence-based approach is at stake, the Court will only accept that Article 8 is applicable where these consequences are very serious and affect an individual's private life to a very significant degree (ibid., § 116).

87. In the present case the legislative amendments in 2016 and their subsequent implementation resulted in effective prevention of the applicants from exercising their judicial functions as Supreme Court judges without their formal dismissal. The reasons underpinning those measures were not expressly related to the applicants, let alone their private lives. It is therefore the consequence-based approach which may bring the issue under Article 8.

88. The Court takes note of the Government's argument that the payment of salaries was not interrupted after the impugned measures and that the applicants' reputation had not been affected given the general reasons for the undergoing judicial reform. However, the principal negative consequence alleged by the applicants was that after the impugned measures they could no longer exercise their functions as Supreme Court judges. In this regard the Court observes that even assuming that the applicants were not substantially affected financially, the impugned measures deprived them of the opportunity to continue their judicial work and to live in the professional environment where they could pursue their goals of professional and personal development. At the time of the consideration of

the case by the Court, these substantial effects for the applicants' private lives have not been put right after the decision of the Constitutional Court confirming the applicability of the principle of irremovability in their regard (see paragraph 17 above).

89. Having regard to the nature and the duration of the negative effects, the Court considers that the impugned measures affected the applicants' private lives to a very significant degree, falling therefore within the scope of Article 8. The Government objection is therefore dismissed.

90. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

91. The applicants maintained that there was a violation of Article 8 of the Convention and that, despite the favourable decision by the Constitutional Court, they had not been permitted to resume their judicial functions.

92. The Government contended that the measures complained of were lawful and they pursued a legitimate aim of reforming the domestic judiciary. Moreover, the measures at issue were not disproportionate in respect of the applicants who had options of participating in the competition for the new SC or being transferred to other domestic courts.

2. The Court's assessment

93. As noted above, the applicants' prevention from exercising judicial functions affected their private lives to a very significant degree. The impugned measures therefore constituted an interference with the applicants' right to respect for private life (see also *Oleksandr Volkov,* cited above, §§ 165-67*,* with further references).

94. The interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.

95. The expression "in accordance with the law" in Article 8 § 2 of the Convention, in essence, refers back to national law and states the obligation to conform to the substantive and procedural rules thereof (see *Akopyan v. Ukraine*, no. 12317/06, § 109, 5 June 2014). Where it has been shown that the interference was not in accordance with the law, a violation of Article 8 of the Convention will normally be found without investigating whether the interference pursued a 'legitimate aim' or was

'necessary in a democratic society' (see, for some examples, *Ciorap v. Moldova*, no. 12066/02, § 104, 19 June 2007**,** *Khalikova v. Azerbaijan*, no. 42883/11, § 128, 22 October 2015, *Chukayev v. Russia*, no. 36814/06, § 137, 5 November 2015, *Porowski v. Poland*, no. 34458/03, § 171, 21 March 2017).

96. The expression "in accordance with the law" also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him or her, and compatible with the rule of law. The phrase thus implies, *inter alia*, that domestic law must be sufficiently foreseeable in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are entitled to resort to measures affecting their rights under the Convention (see *Fernández Martínez v. Spain* [GC], no. 56030/07, § 117, ECHR 2014 (extracts), with further references).

97. In the present case, even though the interference complained of originates from a parliamentary law, the question arises whether it was lawful for the purpose of the Convention, notably whether the relevant legal framework was foreseeable in its application and compatible with the rule of law.

98. In this regard the Court takes note of the Constitutional Court's ruling of 18 February 2020 by which the relevant legislative measures were declared unconstitutional. The Constitutional Court considered that the amendments to the Constitution in 2016 did not violate the principle of the institutional continuity of the highest judicial body which continued to operate under the name "Supreme Court". According to the Constitutional Court, the renaming of the judicial body envisaged in the Constitution could not take place without the transfer of judges of the SCU to the offices of judges of the SC, since there was no difference between the legal status of a judge of the SCU and a judge of the SC. The removal of the word "Ukraine" from the phrase "the Supreme Court of Ukraine" could not be the grounds for dismissal of all judges of the SCU or their transfer to another court, all the more so to a lower court. The Constitutional Court found therefore that the judges of the SCU had to continue to exercise their powers as judges of the SC and that making a difference between judges of the SCU and those of the SC was not consistent with the principle of irremovability of judges, which was part of the constitutional guarantee of the independence of judges (see paragraph 17 above).

99. The Court does not find any reason to disagree with the above considerations. The Government have not demonstrated that the manner in which the applicants had been compelled to compete in order to maintain their right to carry out their judicial duties and, in particular, the manner in which the competition was organised, including the choice of assessors and the lack of institutional and procedural safeguards, could be reconciled with

the Constitutional principles on the general protection of individual rights and with the specific guarantees relating to tenure of judicial office (see paragraphs 23 and 24 above), including the principle of the irremovability of judges which, according to the Court's case-law and international and Council of Europe instruments, is a key element for the maintenance of judicial independence and public trust in the judiciary (see *Baka*, cited above, § 172).

100. Nevertheless, despite the ruling of the Constitutional Court, the issue of the applicants' resumption of their judicial functions was still under examination by Parliament as of June 2021 (see paragraph 18 above). In assessing the applicants' case, the Court observes that since December 2017, when the SC started to operate (see paragraph 14 above), the applicants have not been able to exercise their judicial functions as Supreme Court judges. There has, therefore, been a clear lack of coordination in addressing the applicants' situation for a considerable period which seriously undermined the legal certainty and predictability of the constitutional principles on judicial independence.

101. In view of the above considerations, the Court finds that the interference at issue fell short of the requirements of lawfulness for the purpose of the Convention. Accordingly, there has been a violation of Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. 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

103. The applicants provided calculations of alleged pecuniary damage which consisted of lost salaries for the period during which they could not exercise their judicial duties as Supreme Court judges. The applicants further claimed 10,000 euros (EUR) each in respect of non-pecuniary damage.

104. The Government submitted that the claims for pecuniary damage had been unfounded because the applicants had been offered payment of their salaries by the Liquidation Commission of the SCU but had failed to appear and collect the money. The Government also submitted that there had been no causal link between the alleged violations and the pecuniary damage claimed. They further maintained that the claim for non-pecuniary damages had been fully unsubstantiated.

105. The Court takes note of the Government's submissions and considers that the applicants failed to prove that they had sustained any pecuniary damage resulting from the violations found. It therefore dismisses the claim for pecuniary damage.

106. The Court further considers that the applicants have suffered non-pecuniary damage which is not sufficiently compensated by the finding of violations of the Convention. Considering the circumstances of the case and making its assessment on an equitable basis, the Court awards each applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

107. The applicants made no claim for costs and expenses. The Courts therefore makes no award under this head.

C. Default interest

108. 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. *Joins to the merits* the Government's objection on grounds of the six-month rule, which concerned the admissibility of the applicants' complaint of alleged lack of access to court (Article 6 § 1), and rejects that objection after an examination of the merits;

2. *Declares* the complaints concerning access to court (Article 6 § 1) and the right to respect for private life (Article 8) admissible and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the applicants' right of access to a court;

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

5. *Holds*
   (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros)**,** plus any tax that may be chargeable, in respect

of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(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;

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

Done in English, and notified in writing on 22 July 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Victor Soloveytchik
Registrar

Síofra O'Leary
President

APPENDIX

List of applicants:

No.	Applicant's Name	Year of birth	Place of residence
1.	Vasyl Ivanovych GUMENYUK	1958	Kyiv
2.	Galyna Volodymyrivna KANYGINA	1957	Kyiv
3.	Lyudmyla Ivanivna OKHRIMCHUK	1954	Kyiv
4.	Bogdan Mykolayovych POSHVA	1959	Kyiv
5.	Viktor Fedorovych SHKOLYAROV	1960	Kyiv
6.	Oleksandr Fedorovych VOLKOV	1957	Kyiv
7.	Anatoliy Anatoliyovych YEMETS	1963	Kyiv
8.	Tetyana Yevgenivna ZHAYVORONOK	1960	Kyiv