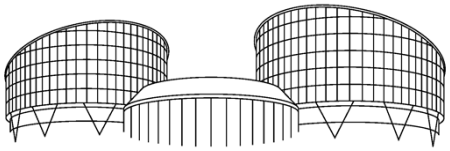

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF SAMSIN v. UKRAINE

(Application no. 38977/19)

JUDGMENT

Art 8 • Private life • Unjustified dismissal and application of legislative lustration measures to former Supreme Court judge, in the absence of an individualised assessment of conduct and despite failure to submit lustration declaration • Legitimate aim achievable in circumstances of the case by accepting applicant's resignation

STRASBOURG

14 October 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 Samsin v. Ukraine,

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

Síofra O'Leary, *President,*
Mārtiņš Mits,
Ganna Yudkivska,
Stéphanie Mourou-Vikström,
Jovan Ilievski,
Lado Chanturia,
Ivana Jelić, *judges,*

and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 38977/19) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Igor Leonovych Samsin ("the applicant"), on 18 July 2019;

the decision to give notice to the Ukrainian Government ("the Government") of the complaints under Articles 8 and 14 of the Convention and to declare the remainder of the application inadmissible;

the parties' observations;

Having deliberated in private on 21 September 2021,

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

INTRODUCTION

1. The applicant complained, in particular, that his dismissal from the position of Supreme Court judge and the measures applied to him under the Government Cleansing (Lustration) Act had breached his rights under Article 8 of the Convention.

THE FACTS

2. The applicant was born on 30 November 1957 and lives in Kyiv. The applicant was represented by Mr I.V. Boychenyuk, a lawyer practising in Kyiv.

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

4. Information on the background to the events leading to the adoption of the Lustration Act can be found in *Polyakh and Others v. Ukraine* (nos. 58812/15 and 4 others, 17 October 2019).

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

6. The applicant was first appointed as a judge in 1987. In 1995 he was appointed to the Supreme Court, and in 2003 that appointment was confirmed for an indefinite period (until retirement).

7. In 2005 the Assembly of Judges of Ukraine elected him to the High Judicial Qualifications Commission ("the Commission"). The Commission's primary role is the selection of candidates for judicial posts, and disciplinary proceedings against judges. The applicant was the Commission's chairman from 2006 to 2009. In September 2010 the applicant was again appointed to the Commission by the head of the State Judicial Administration and elected its chairman.

8. On 11 April 2014 the applicant's tenure on the Commission was terminated on the coming into force of the Restoration of Trust in the Judiciary Act (see paragraph 33 below).

9. On 16 October 2014 the Government Cleansing (Lustration) Act ("the GCA") came into force (see the relevant provisions of the Act in paragraph 32 below).

10. The President of the Supreme Court determined that the court's judges had to submit the declarations required by the GCA between 1 and 11 November 2014. On 11 December 2014 the Acting President of the Supreme Court informed the Ministry of Justice ("the Ministry") that the applicant had failed to submit that declaration.

11. On 13 March 2015 the Ministry requested from the Commission information about individuals who were members of the Commission in 2010-2014 (the GCA's "one-year rule"). The Commission provided the relevant information on 26 March 2015, confirming that the applicant had been a Commission member from 2010 to 2014, that is for more than a year in the relevant period.

12. On 3 and 9 September 2015 the Ministry submitted to the High Council of Justice ("the HCJ') applications seeking the applicant's dismissal from his judicial post under the GCA on the grounds that he had not submitted his declaration, and because the GCA's one-year rule applied to him.

13. On 19 November 2015 the HCJ's disciplinary section recommended to the HCJ that it open proceedings in relation to the Ministry's applications. That recommendation was based on a report prepared by a member of the HCJ. Both documents stated that the GCA's one-year rule applied to the applicant and that he had failed to submit the required declaration.

14. On 11 July 2016 the applicant attempted to resign from the Supreme Court and submitted an application to that effect for examination by the HCJ (see the relevant provisions of the domestic law on judicial resignations in paragraph 29 below).

15. On 6 September 2016 the HCJ decided to postpone its examination of the applicant's resignation application until it had examined the Ministry's applications.

16. In the proceedings before the HCJ the applicant argued that he had not submitted a lustration declaration since, on a literal reading of the GCA,

whatever he said in the declaration would lead to his dismissal. However, the applicant submitted that the provisions of the GCA could not lead to his dismissal since the GCA was contrary to the principles of post-Communist lustration set out in Council of Europe documents (see *Polyakh*, cited above, §§ 104 and 105), in particular as it provided for measures against civil servants without any evaluation of their individual role and conduct. The applicant stressed that he had not engaged in any blameworthy conduct and therefore application of the GCA measures to him could not serve the proclaimed purpose of the GCA, namely addressing the negative phenomena which had afflicted the civil service under the former President of Ukraine. He also pointed out that, in any event, he had already in 2014 been removed from the Commission under the Restoration of Trust in the Judiciary Act.

17. On 25 April 2017 the HCJ dismissed the applicant from the position of Supreme Court judge. The HCJ found that the GCA's one-year rule applied to the applicant, and he had failed to submit a lustration declaration. Subsequently the HCJ left the applicant's resignation application without consideration because he had already been dismissed from judicial office. This deprived the applicant of the benefits associated with judicial retirement, banned him from employment in the civil service until the end of 2024, and put his name in a publicly accessible Lustration Register.

18. The applicant appealed against the decision, reiterating the same arguments he had raised before the HCJ. The case was examined by the Administrative Court of Cassation ("the ACC"), sitting as a first-instance court.

19. On 22 March 2018 the ACC suspended the proceedings concerning the applicant's appeal until the Constitutional Court had ruled on the constitutionality of the GCA (for more detail on those proceedings see *Polyakh*, cited above, §§ 60-70)[1] but on 17 May 2018 the Grand Chamber of the Supreme Court quashed that decision and held that the examination of the case had to proceed.

20. On 18 September 2018 the ACC allowed the applicant's claim and quashed the HCJ's decision. It found that, while the GCA applied to the applicant under the Act's one-year rule and because the applicant had failed to submit a lustration declaration, the HCJ's decision had been disproportionate. This was because the GCA's goal was to remove certain categories of civil servants from their positions, not to punish them, and that goal could have been achieved by allowing the applicant to resign.

21. The Ministry and the HCJ appealed.

22. On 31 January 2019 the Grand Chamber of the Supreme Court quashed the ACC's ruling and upheld the HCJ's decision. The Grand

[1] According to the latest information available to the Court, those proceedings are currently still pending before the Constitutional Court.

Chamber agreed with the ACC's assessment that the GCA applied to the applicant under the Act's one-year rule and because the applicant had failed to submit a lustration declaration but considered that the proportionality principle had not been breached. The relevant parts of the Grand Chamber's decision read, insofar as relevant:

> "[The ACC][2] came to the conclusion that the HCJ had breached the principle of proportionality because the applicant had intended to remove himself from the exercise of State power of his own volition, which would in itself be the result at which the lustration procedure was aimed. In other words, according to the position of the first-instance court, the interference with the rights of a person (dismissal of the plaintiff) did not justify the aim of the lustration process, that is the "balance was not achieved" and this conclusion was found by the court to be sufficient to set aside the decision of the HCJ of 25 April 2017...
>
> By contrast [the appellants] argued that the court's conclusion concerning the violation of the constitutional right of the plaintiff to retire had not corresponded to the circumstances of the case because the HCJ had complied with the requirements of legislation in that respect.
>
> The Grand Chamber accepts this position of the appellants and considers it necessary to point out the following.
>
> The GCA establishes one procedure for voluntary removal of the subject of lustration from State power, that is for him to inform the competent authorities in his statement that restrictions under the GCA apply to him...
>
> The Grand Chamber specifies that the plaintiff did not lodge the statement envisaged by the Act.. within the time-limit set by the order of the president of the Supreme Court... This statement was not lodged later either.
>
> The plaintiff's failure to submit the statement is grounds for the [imposition of restrictions under the Act] because this provision of the legislation is obligatory.
>
> The case-file material shows that on 11 July 2016 the plaintiff lodged the application for resignation from the position of the judge of the Supreme Court of Ukraine. In other words, the application was submitted after the HCJ had received applications from the Ministry... and started considering them according to the procedure established by law.
>
> Therefore the [grounds for the plaintiff's dismissal] had arisen before he had expressed his willingness to resign. And that is why the HCJ had lawfully postponed the examination of his resignation application of 11 July 2016 until examination of the above-mentioned applications from the Ministry of Justice. This did not contradict the Rules of the HCJ.
>
> The Grand Chamber also considers it necessary to point out that the right to resign can be used by the judge if before the lodging of the application for resignation he had not committed any actions which may justify his dismissal by the competent authorities on other grounds.
>
> The reason for this is that the judge dismissed based on his resignation application retains the title of the judge... The title is not retained in case of dismissal on other grounds.

[2] While the Grand Chamber's judgment uses the full names, the translation, for the sake of brevity, uses the same abbreviations as in the remainder of the Court's judgment.

According to section 120 of the Judiciary and the Status of Judges Act as worded at the relevant time the resignation application shall be launched by the judge directly with the HCJ which, within a month of receipt of that application, had to make an application for dismissal due to resignation to the authority who had appointed the judge. However this provision does not deprive the HCJ of the possibility to exercise other powers envisaged by the Constitution and the laws.

...

Accordingly, the first-instance court's conclusion that the HCJ breached the plaintiff's constitutional right to resignation does not correspond to the circumstances of the case and is not in accordance with the provisions of the Constitution and the laws of Ukraine.

The Grand Chamber also agrees with the appellants' arguments concerning the absence of the breach of the principle of proportionality by the HCJ in dismissing the plaintiff under the GCA and concerning the legitimacy of the aim pursued by the limitation of the plaintiff's rights in view of the following.

It can be seen from analysing the provisions of the GCA and of the Restoration of Trust in the Judiciary Act that their main goal is the implementation in Ukraine of the Government cleansing procedure, most importantly to restore the citizens' trust in the authorities, including the authority of the judiciary. The legislator designated termination of the powers of the members of the HCJ and the High Judicial Qualifications Commission as one of such measures.

In view of the above-mentioned circumstances the plaintiff, as the member of the Commission, was subject to those measures due to his membership in that body during the period determined in the GCA.

The Government-cleansing measures (lustration) are an expression of the concept of democracy capable of defending itself. The Parliament is responsible vis-à-vis the people for the creation of an effective State apparatus which is capable of defending democracy, the rule of law and guaranteeing human rights. However, the principle of democracy capable of defending itself; considering the principles of morality in law, does not give the State any authority to violate human rights.

...

The Grand Chamber agrees with the arguments set out in the HCJ's appeal that in this case there was an interference with the plaintiff's right to occupy the post of a judge which in the context of the case-law of the European Court of Human Rights is an aspect of the right to respect for private and family life guaranteed by Article 8 of the Convention. However, this interference was based on the legislative requirement and had for its aim protection of the rights and freedom of others, namely restoration of the citizens' trust in the authorities and in the judiciary. That was in accordance with the provisions of paragraph 2 of Article 8 of the Convention.

Limitation of the plaintiff's rights was conducted on the basis of the Act which has not been declared unconstitutional by the Constitutional Court of Ukraine... The fact that the constitutionality of the Act is under examination by the Constitutional Court of Ukraine cannot be used as an argument in the present case for the court's own assessment of its provisions for compliance with the Basic Law. This assessment can be done only after decision of the Constitutional Court.

...

To comply with the principle of proportionality the limitation on the rights must be provided by a legislative act, pursue a legitimate aim and must be commensurate to that aim, that is there must be a relationship between the result which is being attained by the limitation and the harm which can be inflicted.

According to the preamble of the GCA that Act determines legal and organisational measures concerning implementation of Government cleansing (lustration) and consolidation of democratic values, rule of law and human rights in Ukraine.

To achieve that aim the Act implements the procedure for verification of people who are subject to that verification to check their compliance with the criteria established by the law, to determine whether they can remain in the respective positions.

Therefore the aim of the implementation of the Act is to protect the rights and freedoms of others, it is legitimate and this implementation must be beneficial to ensuring the balance between the needs of a democratic State and defence of democracy and human rights.

In the context of the present case the Grand Chamber also notes the following.

A judge must maintain high standards of conduct in any activity in order to ensure public trust in the judiciary [citing the Judiciary and the Status of Judges Act 2016 – see paragraph 31 below].

As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office [citing the Bangalore Principles – see paragraph 35 below].

According to the [Code of Judicial Ethics – see paragraph 34 below] judges must be examples of observance of the law. Judges must endeavor to conduct themselves in such a manner that their conduct would be considered irreproachable by a reasonable, law-abiding and well-informed person.

Therefore a person who has its status of a judge must ensure high standards of conduct in all of their activities. The first expression of this is unwavering compliance with the requirements of the legislation, including duties and limitations imposed on a judge.

In consequence, the plaintiff's failure to submit a lustration declaration was contrary to [the Bangalore Principles and the Code of Judicial Ethics].

The Grand Chamber, taking into account the above-mentioned, having examined the body of the evidence assessed in the course of judicial examination, and having examined all the arguments of the parties, considers that [the HCJ, in its decision to dismiss the applicant on 25 April 2017 and not to examine his resignation application], acted within the limits of its powers and in a manner envisaged by the Constitution and the laws of Ukraine, in compliance with the principle of proportionality."

23. The applicant lodged a complaint with the Constitutional Court, alleging that the GCA provisions applied in his case were unconstitutional. The Constitutional Court started the proceedings concerning the complaint on 22 April 2019. As of the time of the parties' latest communication with the Court (21 May 2021), those proceedings remained pending.

As indicated in *Polyakh and Others* (cited above, §§ 60-70) the proceedings concerning the constitutionality of the GCA have been pending before the Constitutional Court since 2014.

24. According to the publicly accessible Lustration Register, the applicant is subject to the ten-year prohibition under the GCA's one-year rule (see paragraph 32 below).[3]

25. According to the applicant, in May 2017 he stopped receiving his salary. At that time, his salary which would have been taken into account for a resignation allowance and judicial pension, was 41,600 Ukrainian hryvnias (UAH). Had the applicant been allowed to resign, based on that level of salary and the length of his judicial career (see paragraph 30 below), he would have been initially entitled to a resignation allowance of UAH 37,440 (about 1,110 euros (EUR) at the end of December 2021). According to him, this would have been increased, starting from November 2018, based on subsequent raises in remuneration of active Supreme Court judges, to reach UAH 354,713 per month in February 2021.

26. In fact, in December 2017, on reaching sixty (the general retirement age for men), the applicant obtained an ordinary old-age pension of UAH 10,740 (about 320 EUR). This was subsequently raised, apparently in line with legislative raises in the minimum pension, to reach UAH 14,809 in February 2021.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Domestic material

1. Constitution

27. Article 126 of the Constitution provides for the mandatory retirement age of sixty-five for judges.

2. Code of Administrative Justice 2005 (2017 restatement)

28. Article 361 § 5 (3) of the Code provides that the finding of a violation of Ukraine's international obligations by an international judicial institution is grounds for requesting the reopening of proceedings in an administrative case.

3. Judiciary and the Status of Judges Act 2010 (as in force at the relevant time)

29. Section 120 of the Act provided that judges who had served for at least twenty years could resign, preserving their judicial status and related immunities. Applications had to be submitted to the HCJ which, within a

[3] See https://lustration.minjust.gov.ua/register (last accessed on 3 June 2021).

month of receipt of that application, had to make an application for dismissal due to resignation to the authority who had appointed the judge (constitutional changes of September 2016 conferred on the HCJ itself the power to dismiss judges).

30. Section 141 of the Act contained detailed rules concerning calculation of the allowance for judges who resigned from their post and of judicial pensions. The amount of the allowance was 60 per cent of the compensation of an active judge serving in an equivalent post. On reaching 62 years they could either keep that allowance or receive a judicial pension. The Constitutional Court declared the relevant provisions unconstitutional on 8 June 2016 and specified that the allowance must be 80 per cent of the compensation of an equivalent active judge, and had to be increased by two per cent per additional year of service, up to 90 per cent of an active judge's compensation. The allowance amount had to change in line with changes to the compensation of equivalent active judges.

4. Judiciary and the Status of Judges Act 2016

31. Section 56(7)(2) of the Judiciary and the Status of Judges Act 2016 provides that judges, among their other duties, must maintain high standards of conduct in any activity in order to ensure public trust in the judiciary.

5. Government Cleansing (Lustration) Act 2014

32. The relevant provisions of the GCA are summarised in *Polyakh* (cited above, §§ 73, 74 and 77) as follows:

> "*2. Categories of individuals subject to restrictive measures: the one-year rule and the "EuroMaidan" period rule*
>
> 73. The Act provides for the dismissal of certain categories of individuals from their positions in the civil service. These include individuals who (a) for at least a year in the period from 25 February 2010 to 22 February 2014 ("the one-year period") or (b) for any period of time from 21 November 2013 to 22 February 2014 (the "EuroMaidan period") occupied the following positions:
>
> ...
>
> (iii) members of the High Council of Justice, the High Judicial Qualifications Commission, the head and deputy heads of the State Judicial Administration;
>
> ...
>
> *3. Ten-year and five-year bans*
>
> 74. A person dismissed from any of the above-mentioned positions for the above-mentioned reasons would then be banned for ten years from the Act coming into force, that is, until 16 October 2024, from occupying positions in the civil service or local government (*посадових та службових осіб органів державної влади, органів місцевого самоврядування*) and directors of State-owned companies working in the defence sector or those providing administrative services on behalf of government agencies (section 2 and section 1(3) of the GCA) ("ten-year ban").

...

4. Procedure

77. The GCA requires all State and local government officials to lodge with their superiors, within the time frame approved by the relevant government entities, a statement (declaration) declaring whether any of the restrictions in the GCA apply to them and providing consent to the statement being checked (sections 4(1) and 2(1)(1) to (10)). Once screening is started in respect of a given government entity, all officials working there must file a declaration within ten days. Failure to file a declaration or filing a declaration stating that the GCA applies is grounds for dismissal (section 4(3)). If the official files a declaration stating that the GCA does not apply to him or her, the relevant authority then conducts a check and draws up a report. If it is found, as a result of the check, that the GCA does apply to the official, his or her superior either dismisses him or her or refers the matter to the body competent to do so with an application for dismissal (section 5(14)).”

6. Restoration of Trust in the Judiciary Act 2014

33. The Act came into force on 11 April 2014. It provided that from the date of the Act’s entry into force, the powers of the members of the High Council of Justice, the High Judicial Qualifications Commission and presidents of the higher courts would come to an end and that new elections would be held for those positions.

7. Code of Judicial Ethics approved by the Assembly of Judges of Ukraine on 22 February 2013

34. Article 1 of the Code provides that judges must be examples of observance of the law, of the principle of the rule of law, and of their judicial oath, and must maintain high standards of conduct to strengthen public confidence in the judiciary. Article 3 provides that judges must endeavor to conduct themselves in such a manner that their conduct would be considered irreproachable by a reasonable, law-abiding and well-informed person.

B. International material

1. Bangalore Principles

35. The Bangalore Draft Code of Judicial Conduct 2001 was adopted by the Judicial Group on Strengthening Judicial Integrity, and it was revised at the Round Table Meeting of Chief Justices held in The Hague in November 2002. The relevant principle contained therein reads as follows:

> “4.2 As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.”

2. Venice Commission's opinions on the GCA

36. The relevant parts of the interim and final opinions of the Venice Commission on the GCA, adopted at 101st and 103rd (12-13 December 2014 and 19-20 June 2015) plenary sessions respectively, read as follows:

Interim opinion

"65. Under the Lustration law individuals subject to lustration have no possibility to prove that despite the position they held they did not engage in any violations of human rights and did not take or support any anti-democratic measures. There does not appear to be any possibility to invoke the time elapsed since the occupation of the position nor the subsequent conduct and attitude. The European Court of Human Rights has accepted that an extremely serious past conduct – namely collaboration with the Securitate - may become a criterion of permanent ineligibility to the public function. In the Commission's view, however, the fact that the Lustration law excludes the time factor altogether, irrespective of the gravity of the past conduct, collides with the principle of "individual liability" on which lustration must be based (Article 1.2). Even a voluntary resignation from the position prior to 22 February 2014 would not be sufficient to be excluded from lustration. In the Commission's view, the individual should be given the opportunity to resign voluntarily: this would save governmental financial and human resources, while shielding the person from revealing his or her identity.

...

76. There is an overlap between the Lustration Law and the Law on the Restoration of the Trust in the Judiciary as concerns the Maidan events. The Ukrainian authorities have explained that the inclusion of judges in the new law was justified on two grounds: first, the previous law has proved ineffective (the number of cases processed by the special commission is negligible); second, the previous law does not enable to ban the lustrated judge from public service. The Venice Commission finds that if the previous law is deemed to be ineffective, it should be repealed and replaced by new, more effective provisions which however duly respect the constitutional rules on the independence of judges. The current overlap creates problems of legal certainty and of co-ordination: if a judge has already been the object of a procedure under the Law on the Restoration of Trust in the Judiciary, he or she should be immune from the application of the Lustration law pursuant to the principle of *ne bis in idem*. If no procedure has been carried out yet, it is unclear which procedure prevails. The lustration of judges should be regulated in one law only."

Final opinion

"64. In its Interim Opinion, the Venice Commission noted that "*even a voluntary resignation from the position prior to 22 February 2014 would not be sufficient to be excluded from lustration*" (para. 65). The 1996 Guidelines explicitly state that "*lustration shall not be imposed on a person who /.../ in good faith voluntarily repudiated and/or abandoned membership, employment or agency with the relevant organisation before the transition to a democratic régime*" (para. l).

65. The draft amendments take this requirement partly into account by providing in the heading of Article 3(2) that the ban shall be imposed on the relevant persons who *"were not retired from the office on their own will"*. The provision is not completely clear as to whether the retirement must have occurred in the given period (21 November 2013 – 22 February 2014) or whether later retirement would also be

taken into account. The draft amendments fail to include a similar provision into other sections of Article 3. Since "*the aim of lustration is not to punish people presumed guilty /.../ but to protect the newly-emerged democracy*" (Preamble of the Guidelines), the changes in individual attitudes are a factor to be taken into account with respect to all categories of individuals.

...

111. The Venice Commission would particularly like to draw attention to the following main points:

...

b) Ordinary judges should be excluded from Article 2(4) and subject solely to the regime of the Law on the restoration of trust in the judiciary of Ukraine. "

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

37. The applicant complained of a violation of his rights under Article 8 of the Convention following his dismissal from the position of Supreme Court judge. Article 8 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

38. The Government did not raise any objection as to admissibility of the present application in view of the proceedings pending before the Constitutional Court (see paragraph 23 above) and it is therefore not necessary for the Court to address that issue. The Court, however, observes that according to the publicly available information the proceedings for review of the constitutionality of the Government Cleansing Act launched in 2015 and discussed in *Polyakh and Others v. Ukraine* (nos. 58812/15 and 4 others, §§ 60-70, 177-96, 17 October 2019) remain pending.

39. As to applicability of Article 8, the Court already held in *Polyakh and Others* (cited above, §§ 208-11) that application of measures under the Government Cleansing Act constituted an interference with the right to respect for private life, on account of the combination of the following factors:

(i) the applicants were dismissed from the civil service losing all their remuneration with immediate effect;

(ii) they were banned from occupying positions in the civil service for ten years, and

(iii) the applicants' names were entered into the publicly accessible online Lustration Register. which was very likely to be associated with social and professional stigma.

40. In *Oleksandr Volkov v. Ukraine* (no. 21722/11, §§ 165-67, ECHR 2013), the Court also found that dismissal of a Supreme Court judge due to a "breach of judicial oath" had constituted an interference with his right to respect for private life because it had involved loss of job with consequences for his material well-being and had affected his reputation.

41. All those considerations are equally applicable in the present case. The fact that the applicant was only about five years away from mandatory retirement age at the time he was effectively dismissed is not sufficient to change that conclusion.

42. Firstly, the applicant suffered considerable prejudice in terms of retirement payments to which he was entitled (see paragraphs 25 and 26 above).

43. Moreover, in *Gumenyuk and Others v. Ukraine* (no. 11423/19, §§ 86-89, 22 July 2021, not yet final) the Court found Article 8 applicable on account of the fact that some Supreme Court judges were prevented from exercising judicial functions even though some of them were closer to retirement age at the relevant time than the applicant (two applicants, like Mr Samsin, were born in 1957 and one in 1954 – see Appendix to the *Gumenyuk and Others* judgment) and there was no indication that they lost their remuneration (ibid., § 88) or suffered any prejudice in terms of retirement payments.

44. The Court concludes that Article 8 of the Convention is applicable in the present case.

45. 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

46. The applicant argued that the High Council of Justice ("the HCJ") had unlawfully postponed the examination of his resignation application, and had had to examine it within thirty days after it had been lodged, regardless of the application under the Government Cleansing Act ("the GCA"). He relied on the legislative provision set out in paragraph 29 above.

47. He stressed that it had not been merely the absence of his lustration declaration but also his having occupied the position on the High Judicial Qualifications Commission ("the Commission") that had been grounds for his dismissal. Had he submitted the declaration, this would not have allowed

him to argue that the GCA did not apply to him. The absence of the declaration had not prevented the authorities from investigating the issue themselves, affirming in the domestic proceedings that the GCA's one-year rule applied to him and publishing that information in the Lustration Register.

48. The Government accepted that there was an interference with the applicant's rights under Article 8. That interference was lawful, on the basis of the GCA. The Grand Chamber of the Supreme Court had found that there had been grounds for applying the GCA to the applicant, and had found that the relevant procedure had been duly followed. As to the necessity of the interference, in *Polyakh and Others v. Ukraine* (nos. 58812/15 and 4 others, §§ 285 and 286, 17 October 2019), the Court had recognised that the period when the applicant had chaired the Commission (2010-2014) was characterised by a number of negative developments which had in principle justified measures of change and reform in the civil service.

49. During that period the applicant had held one of the highest positions in the State which had an impact on the entire judicial system, unlike the applicants in *Polyakh* (cited above), who had been lower-level civil servants. The application of the GCA measures to the applicant had therefore corresponded not only to the formal statutory grounds under the Act but also to the legitimate aim of removing from office those who had contributed to the above-mentioned negative developments. The assessment of the applicant's individual role could only be done through the verification process envisaged by the GCA, on the submission of a declaration consenting to undergo the verification process set out in the Act. The applicant's refusal to submit that declaration had not only prevented such an assessment but had also demonstrated his disregard for the law and his duties as a judge. As a judge of the highest court, he had to demonstrate openness, which was essential to restore and maintain public confidence in the judiciary. The applicant's dismissal had therefore been the only possible way of achieving the objective of restoring confidence in the judiciary.

2. The Court's assessment

50. In *Polyakh* (cited above, §§ 267-82) the Court held that application of the measures under the GCA constituted an interference with the applicants' right to respect for their private life, that it was "in accordance with the law", and presumably pursued the legitimate aims of the protection of national security and public safety, the prevention of disorder, and the protection of the rights and freedoms of others.

51. In view of its findings above concerning applicability of Article 8 and its conclusions below, the Court does not see a reason to revisit those conclusions in the present case. To the extent that the applicant argued that the interference was not in accordance with the law because the HCJ could not postpone the examination of his resignation application and had to

examine it before the Ministry of Justice's application under the GCA, that issue in any event goes primarily to the question of whether the interference was necessary in a democratic society (see *Polyakh*, cited above, § 269, and, *mutatis mutandis*, *Chumak v. Ukraine*, no. 44529/09, § 48, 6 March 2018).

52. Turning to that matter, the Court observes that in *Polyakh* (cited above, §§ 296-98) it found a violation of Article 8, holding that the application of measures of considerable severity under the GCA to the applicants had not been based on an individualised assessment of their conduct, in the absence of cogent reasons for such an approach and in the absence of sufficiently narrow tailoring of those measures to address the "pressing social need" that the GCA ought to have been pursuing.

53. The Government argued that the applicant's case had to be distinguished from *Polyakh* (cited above) in that an individualised assessment of his role and conduct had been prevented by his failure to submit a lustration declaration (see paragraph 49 above). In the assessment of the Grand Chamber of the Supreme Court, such a failure amounted to a serious breach of the applicant's duties as a Supreme Court judge, justifying his dismissal.

54. The Court is not persuaded by this argument. In *Polyakh* (cited above, §§ 309-15) the Court has already dealt with the case of an applicant who had been dismissed for filing his lustration declaration with a four-day delay. It noted:

> "314. The essence of the declaration in question was the official's statement to the effect that the GCA restrictive measures applied or did not apply to him ... However, in the present case there was never any suggestion that there were any unknown facts in the fourth applicant's career which the declaration could reveal ... In that sense the obligation to file a declaration in the present case was different to the situations where such an obligation was aimed at revealing certain potentially hidden facts, such as secret collaboration with the security services of former totalitarian regimes (as was the case, for example, with the Polish lustration system, examined in many judgments including *Matyjek* [*v. Poland*, no. 38184/03, 24 April 2007], *Bobek* [*v. Poland*, no. 68761/01, 17 July 2007] and *Luboch* [*v. Poland*, no. 37469/05, 15 January 2008] ...)."

55. Those considerations are also pertinent in the present case. The applicant's membership of the Commission in 2010 to 2014 was a matter of public record. The authorities were undoubtedly aware of that fact and mentioned it in their decisions (see paragraphs 11 to 13 above). The relevant domestic decisions and the information in the Lustration Register demonstrate that it was not only the applicant's failure to submit the declaration, but also the fact that he had served on the Commission in 2010 to 2014, that constituted the grounds for his dismissal (see paragraphs 17, 22 and 24 above).

56. As to the argument that the applicant's failure to submit a lustration declaration prevented the authorities from assessing his individual role in the relevant period and demonstrated his disregard for the law and the duties of a judge, which failure was incompatible with his being a judge of the

highest judicial instance, the Court only needs to observe that the key aspect of the applicant's argument before the HCJ and the domestic courts was that the goal of removing those who could possibly have been associated with the negative developments during the rule of the former President of Ukraine had already been achieved through the implementation of the Restoration of Trust in the Judiciary Act and he wished to be allowed to resign from his post on the Supreme Court.

57. The Court does not perceive any cogent arguments which would show that, in the absence of any evidence of specific known acts of misconduct on the applicant's part, and even assuming the legitimacy of the goals pursued, those goals could not be achieved, in the particular circumstances of his case (notably the measures already applied to the applicant under the Restoration of Trust in the Judiciary Act), by accepting the applicant's resignation application. Those features of the legislative scheme established by the GCA was also criticised by the Venice Commission (see paragraph 36 above).

58. These considerations are sufficient for the Court to conclude, in the particular circumstances of the present case, that the imposition on the applicant of the measures envisaged by the GCA had not been necessary in a democratic society.

59. There has, therefore, been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

60. The applicant complained, under Article 14 taken in conjunction with Article 8 of the Convention, that he had been discriminated against *vis-à-vis* persons who had not occupied high-ranking positions during the presidency of Mr Yanukovych and *vis-à-vis* another judge (S.) who had been in a similar situation to the applicant but had been allowed to resign. Article 14 of the Convention reads:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

61. The Government submitted that there were no grounds for considering that the applicant had suffered any discrimination.

62. The Court notes that this part of the application is essentially linked to the applicant's complaint under Article 8 of the Convention. This part of the application must therefore likewise be declared admissible.

63. However, in the circumstances of the present case and having regard to its findings above under Article 8, the Court considers that it is not necessary to examine the applicant's complaints under Article 14 taken in conjunction with Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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

65. The applicant claimed 200,152 euros (EUR) in respect of pecuniary damage. That claim was calculated as the amount of the allowance for judges who resigned (see paragraph 30 above) which he would have received between May 2017 (when he stopped receiving his judge's salary) and December 2017, when he started receiving his old age pension, plus, after the latter date, the difference between that old age pension and the judicial pension to which he considered he would have been entitled had he been allowed to resign.

66. The applicant also claimed EUR 10,000 in respect of non-pecuniary damage.

67. The Government contested those claims, considering them unsubstantiated. They disagreed with the applicant's method of calculation of pecuniary damage, in particular his assumption that his pension would have increased following the subsequent increase of compensation for active Supreme Court judges. They contended, in any case, that the domestic law allowed for full reparation, making it unwarranted for the Court to make an award for pecuniary damage. They maintained that the relevant amounts should most appropriately be determined by the domestic courts within the framework of review of the applicant's case by the domestic courts, to which review he would be entitled in the case of a finding of a violation by the Court (see the relevant provision of the Code of Administrative Justice in paragraph 28 above).

68. The Court considers that the question of compensation for pecuniary damage is not ready for decision. That question must accordingly be reserved and the subsequent procedure fixed, having due regard to any agreement which might be reached between the Government and the applicant (Rule 75 §§ 1 and 4 of the Rules of Court).

69. The Court awards the applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

70. The applicant also claimed EUR 1,847 for the costs and expenses incurred before the Court. He submitted a copy of the agreement with his lawyer, under which he undertook to pay the lawyer the lumpsum of

EUR 1,500 in legal fees for representation before the Court, statements of acceptance of legal services detailing the time spent by the lawyer on the case and receipts for parcel shipment and translation services.

71. The Government contested that claim, considering it unjustified and excessive. In particular, they argued that the applicant's translation and postal expenses had been incurred unnecessarily.

72. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,500 covering the costs of the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

73. 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. *Declares* the application admissible;

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

3. *Holds* that there is no need to examine the complaint under Article 14 taken in conjunction with Article 8 of the Convention;

4. *Holds* that, as regards pecuniary damage resulting from the violations found, the question of just satisfaction is not ready for decision and accordingly,
   (a) *reserves* this question;
   (b) *invites* the Government and the applicant to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on this question and, in particular, to notify the Court of any agreement that they may reach;
   (c) *reserves* the further procedure and delegates to the President of the Chamber the power to fix the same if need be;

5. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(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 applicant's claim for just satisfaction in respect of non-pecuniary damage and costs and expenses.

Done in English, and notified in writing on 14 October 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

{signature_p_2}

Martina Keller
Deputy Registrar

Síofra O'Leary
President