



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

FIFTH SECTION

CASE OF GORYAYNOVA v. UKRAINE

(Application no. 41752/09)

JUDGMENT

Art 10 • Freedom of expression • Dismissal of prosecutor after publishing open letter criticising prosecution authorities on the Internet, with regard to alleged corruption • Disciplinary sanctions provided for in domestic law and pursuing legitimate aim of the protection of the reputation of others • No disclosure of information to which an employee could have access in the course of their work • Domestic courts' failure to analyse content and reliability of allegations made by the applicant as well as potential contradictory approach of domestic authorities • No proper examination of relation between applicant's duty of loyalty and public interest in being informed about the sensitive and important matter raised • Failure to analyse applicant's submissions regarding repeated attempts to raise her concerns with her hierarchy and to verify existence of alternative means to report them • Claims of damage caused by applicant's open letter not addressed by domestic courts • No analysis of possibility of less intrusive sanctions • Inadequate procedural safeguards

STRASBOURG

8 October 2020

FINAL

08/01/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Goryaynova v. Ukraine,

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

Síofra O’Leary, *President*,
Gabriele Kucsko-Stadlmayer,
Ganna Yudkivska,
Mārtiņš Mits,
Latif Hüseyinov,
Lado Chanturia,
Anja Seibert-Fohr, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having deliberated in private on 15 September 2020,

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

PROCEDURE

1. The case originated in an application (no. 41752/09) 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, Ms Aurika Aleksandrovna Goryaynova (“the applicant”), on 26 July 2009.

2. The Ukrainian Government (“the Government”) were represented by their Agent, most recently Mr Ivan Lishchyna.

3. The applicant complained, under Article 10 of the Convention, that she had been dismissed from her post at the local prosecutor’s office because she had published on the Internet an open letter to the Prosecutor General of Ukraine in which she had criticised the prosecution authorities.

4. On 3 March 2014 notice of the complaint was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1970 and lives in Kyiv.

6. At the material time the applicant worked at the Odesa regional prosecutor’s office as a senior prosecutor in the department responsible for the representation of citizens and the State before the courts.

7. In early 2006 organisational changes took place in the Odesa regional prosecutor’s office. In particular, a new management was appointed.

8. According to the applicant, her new supervisor sought to introduce some corruption schemes in the department, and put pressure on the applicant and her colleagues to participate in those schemes. She claimed

that those who had refused to comply had been either transferred to other divisions or forced to resign or retire.

9. As submitted by the Government, between August and September 2006 complaints were received from private individuals about the applicant's unlawful participation in certain court proceedings in her capacity as prosecutor. To verify the facts, on 10 October 2006 an inspection was ordered by the Odesa regional prosecutor.

10. In her submissions before the Court the applicant claimed that the inspection had been ordered because she had refused to participate in the corruption schemes. It can be seen from the case file material that between September 2006 and February 2007 she submitted a number of reports (*panopm*) to the Odesa regional prosecutor. In particular, in a report of 21 September 2006 she claimed that her superior, driven by personal enmity and the desire to change the composition of the department, had been putting pressure on her in order to force her to resign. The applicant also sought to explain the circumstances leading to the inspection of her activities and to show that she had done nothing wrong. She also complained that there had been breaches of the law during the inspection. For example, it had been conducted when she had been on sick leave and her medical documents had been requested from the hospital. She also contended that she had not been allowed to work, that is, she had not been granted access to her workplace. In one of the reports submitted in December 2006 she reiterated that her superiors, in order to cover up their unlawful activities and driven by personal enmity towards the applicant and the desire to change the composition of the department, had been spreading untrue information about her.

11. According to the applicant, she received no reply to those complaints. She also claimed that she had sought to meet with the Odesa regional prosecutor in person, but to no avail. It can be seen from the case file material that the applicant brought administrative proceedings against the Odesa regional prosecutor's office and prosecutor, challenging their activities during the inspection. In the framework of those proceedings the Prymorsky District Court of Odesa, in an interim decision of 14 November 2006, ordered the Odesa regional prosecutor's office to refrain from taking any measures related to holding the applicant liable in disciplinary proceedings. That decision was later quashed. The parties did not inform the Court of the outcome of those proceedings.

12. Having received no reply at the local level, the applicant sent several letters by post to the Prosecutor General of Ukraine. In them, she complained about her own situation (namely the allegedly unlawful inspection and its unfair conclusions) but also about other cases of allegedly unlawful initiation of disciplinary proceedings against prosecutors and unlawful dismissals of prosecutors. She also complained of "working

schemes based on profit”. In particular, in a letter sent to the Prosecutor General in early February 2007, the applicant wrote:

“... due to frequent changes of the administration of the Odesa regional prosecutor’s office, but under the invariable direction of the Head of Human Resources Department, B., a number of “‘purges’ of the personnel of the prosecutor’s office took place and as a rule, those who did not want to have any dealings with him were dismissed ‘on the quiet’ or moved to another post. The quality of relations was often assessed in material terms.

The dismissed staff who disagreed applied to the courts to protect their rights ...

As an example, a situation with I. can be cited. She was dismissed unlawfully and – as a mockery – on her birthday. By a court decision she was reinstated with the payment of more than UAH 20,000 in pecuniary and non-pecuniary damages to be borne by the prosecutor’s office. Despite a separate ruling by the Odesa Regional Court of Appeal as to the unlawful actions of the regional prosecutor’s office, not a single person was held liable ...

Therefore, when in my department the administration was dismissed and it was announced, without any explanation of the reasons, that the composition of the department would be changed, I already knew beforehand the whole scenario of this ‘spectacle’ and felt compelled to prevent it, because I could not afford the luxury of being unemployed, having two children. Therefore, anticipating my dismissal I challenged before the courts the actions and omissions of the officials of the prosecutor’s office which as a rule precede unlawful dismissal or a move to another position.

I was forced to take extreme measures as not a single one of my seven letters to the regional prosecutor had been duly examined, that is, their examination had been entrusted to those whose actions I challenged. Also, I did not receive any reply to the questions asked; on the contrary, I was subjected to growing psychological pressure and unlawful actions. ...”

In the same letter the applicant mentioned that several other sets of court proceedings initiated by active or former employees against the Odesa regional prosecutor’s office were pending. She also stated that in the event that her letter was not properly examined, she would turn to the media.

13. The applicant contended that she had not received a reply to her complaints to the Prosecutor General.

14. On 15 February 2007, based on the findings of the inspection (see paragraph 9 above), the applicant was reprimanded. In particular, it was established that in July 2006 when she had been officially on sick leave, she had participated, in her capacity as prosecutor, in a civil case related to housing issues in which a former police officer, G., had been involved. It was also established that she had failed to properly fulfil some other tasks entrusted to her.

15. On an unspecified date the Prosecutor General’s Office of Ukraine ordered an inspection, and its representative arrived in Odesa to conduct it.

16. On 15 March 2007 the applicant published an open letter to the Prosecutor General on an Internet news site. The letter reads as follows:

“... ”

I am forced to address you via the media as I see no other way to draw your attention to the problems of ordinary people.

Recently the prosecutors' offices have changed from being 'the watchdog of a monarch' to being 'a pocket with a hole' (*“із ока господарєва перетворилися у діряву кишеню”*): whatever you put in it is never enough. There are fewer and fewer intellectuals and professionals in the prosecutors' offices who abide by the law. Instead, there are those who bought their posts and 'earn back' the money spent.

I am now ashamed to look ordinary citizens of Ukraine in the face since our law-protection system commands only a sad smile and pity.

Under your leadership, unlawfulness in the prosecutors' offices has become widespread. The prosecutors' offices have become commercial structures aimed at collecting money, and the administration tries to throw onto the street those who do not wish to do so because of their professional and human qualities.

Complaints lodged before you are, in breach of the Law on Citizens' Appeals, forwarded to those persons against whom they are submitted. And the latter persecute the disobedient.

In support [of my words] I will provide examples from the department I work for ...”

The applicant proceeded briefly to explain that the department she worked for had been reorganised in 2006 and that new supervisors had been appointed. She continued:

“With the change of the administration [of the department] the priorities in the divisions' [within the department] work were also changed. Earning money became one of the main aims. It has been openly said at meetings that the department should work in such a way that [people] come to us with 'bags, money, carts' (*“аби до нас йшли з торбами, грошами, возами”*) ...

But the representation of the interests of those citizens who are unable to protect their breached rights and the representation of the State cannot be 'profitable'. The people who worked [for the department] before [its] reorganisation had no idea how to act in accordance with the new priorities of the administration. Then [they] started to oppress the employees.

Given that after the reorganisation all experienced employees of the 'representation division' moved to the 'division of court participation', pressure was mostly put on them under a bogus pretext.

Moreover, N., who returned to the prosecutor's office after retirement and surprisingly became the head of the department (her own explanation was that she has family relations with the Minister of Internal Affairs), decided for some unknown reason that the subordinates disliked her and stated that she would replace everybody in the event of disobedience.

Every employee was warned that he would be subjected to special methods of influence: for example, a husband could have difficulties in his business affairs; one's reputation could be ruined so it would be impossible to find another job in Odesa...

However, it did not produce the desired result: the money did not flow like a river. And the pressure continued.

They started to check all previous cases, to advance claims towards executors who just implemented – in good faith – the decisions of the previous administration.

Eventually the administration found another way to reach its goal: if it is impossible to receive a benefit from those whose interests are to be protected by the prosecutors, a deal should be made with the opposite party. And it is very easy to do, given that N. had for a long time worked as an advocate. Her clients can pay for the services – contrary to those whose interests the prosecutor's office is called on to protect in court proceedings.

The administration's new policy quickly yielded results: the mass removal of prosecutors from cases started, despite the fact that the decisions on their participation had been lawfully taken by the previous administration and the prosecutors had already participated in proceedings.

If the prosecutor concerned insisted on his position and did not wish to withdraw from the case, [his removal] was done in breach of the procedural rules without informing him, by a letter to the court signed by the deputy regional prosecutor, M.

A similar situation exists with the protection of the State's interests before the courts.

Experienced, professional prosecutors are threatened and instructed that they should not even think about expressing their own point of view.

All this produced an immediate result: the staff ran away. Those who already had a right to a pension were lucky, but what about the others?

New employees do not understand what they are doing and why, since from now on the activity of the department is very far from classic representation of the interests of citizens and of the State in the courts. The amount of work has diminished, since now the persons whose interests are to be protected are selected randomly. The work has turned into a bureaucratic re-arranging of unnecessary papers and the quality of work has deteriorated.

All of the department's activities are limited [due] to the permanent pressure on district prosecutors (you should produce numbers!) and it is beautifully named – 'work in the zone' (*"работа по зоне"*). In reality additional numbers are mostly made up.

In order to justify the existence of the department, its head forces the district prosecutors to produce the numbers for two months of the current year identical to those for three months of the previous year. And nobody asks: who needs these numbers if people's rights are unprotected. The quality of work in the courts is beyond any attention. As a result, the prosecutors' offices are ridiculed since in order to get the numbers, they lodge such claims that even parties without a law school diploma laugh at.

I cannot judge what you know about problems of simple employees of prosecutors' offices who work decently for the Motherland in places far away from Kyiv. However, I myself feel the prejudice of the representatives of the Prosecutor General's Office who were supposed to check my complaints of breaches of my rights. Having arrived in order to check the facts presented by me, they did all [they could] to protect your peace of mind and that of those about whom I was complaining. Since there is no possibility to get the word of truth across to the administration of the Prosecutor General's Office, I am forced to protect my rights on my own before the courts. But I am not the first one and not the only one – we are many. We can now

talk about the existence of a true court practice on the restitution of breached rights of the employees of prosecutors' offices."

17. The applicant submitted to the Court an undated copy of another letter she had allegedly sent to the Prosecutor General in March 2007. In the letter she thanked him for ordering the inspection and expressed the hope that it would protect her from attacks by her superiors. She also asked him to pay attention to many other employees whose rights had also been violated and who had been forced to defend them, but lacked the necessary experience. At the end of her letter the applicant submitted that, as she was not sure whether any of her letters had reached the Prosecutor General, she had felt compelled to publish an open letter in the media.

18. On 16 March 2007 the applicant wrote a note to the Prosecutor General (apparently in the framework of the inspection conducted by the Prosecutor General's Office) in which she stated that for some time she had been feeling pressurised by her superiors, even though her attitude towards them was purely professional. She further stated that she had already expressed her concerns about the "work based on profit" during daily briefings. She also mentioned that since the introduction of structural changes in the division, several employees had had to retire, but that she would not provide details about them as that would be inappropriate. She also explained some of the controversial tasks she had been given by her superiors and stated that she had been asked to pay attention to some cases in which interested parties could "propose something" and to inform her superiors if that was the case.

19. On 19 March 2007 the applicant's colleague L., also a prosecutor at the Odesa regional prosecutor's office, wrote to the Prosecutor General. The relevant part of his note reads as follows:

"...

As of the moment of reorganisation and the arrival of the new superiors, who had absolutely no relation to and who had never worked for a regional prosecutor's office in the field of representation (K. and S. are from the 'general supervision' field), the style and areas of work that had been set for years by professional civil-law lawyers from the representation department were drastically changed.

In particular, the representation division was entrusted with the permanent task of preparing claims [to be submitted to the courts]. Information was to be requested from the law-enforcement bodies and claims were drafted using the same template without any checks (somewhat resembling the working style of the district prosecutor's office in the fields of representation and supervision if numbers were needed) ...

My objections addressed to the administration of the department were not accepted, which often caused disagreement on the organisation of work and forced me to move to another division. Before that, another very good specialist and a real professional, K., was forced to quit.

There was a similar situation in the division headed by N., and it is my deepest conviction that this forced F. and R. to move to another division.

A.A. Goryaynova, it seems to me, does not want to abide by the circumstances in her department and division, and has thus become undesirable to her superiors. As far as I am concerned, she is in her place and she performs the duties entrusted to her.

As regards the receipt of benefits, gifts or any dealings in that respect, I do not know anything about this. Likewise, I do not know anything about N. interfering with the resolution of cases using her connections in her previous work as an advocate, as we worked in different divisions. Nor do I know of any deals between N. and S. and the parties to court proceedings ...

I would also like to add that S. threatened me with dismissal after the conflict that arose between us regarding the response to the test task I sent to the Prosecutor General. It happened sometime in October 2006.”

20. On 23 March 2007 an inspection report was prepared by a representative of the Prosecutor General’s Office. It focused mainly on the facts leading to the earlier inspection of the applicant’s activities and her complaints about it (see paragraphs 9, 10, 11 and 12 above). The report essentially endorsed the findings of the earlier inspection, confirming a number of violations in the way in which the applicant had performed her duties and used her status as a prosecutor (see paragraph 14 above). The report also mentioned, without giving any further details, that police enquiries had been conducted into the applicant’s allegations of corruption, but that they had been found unsubstantiated and no criminal case had been opened. It was stated that when questioned about the matter, the management and the employees of the relevant department had denied the existence of any of the facts mentioned by the applicant in her open letter.

21. On 21 and 26 March 2007 two more letters were published by the applicant on the same website. The first concerned police officer G., who was suspected of housing fraud, and the relevant court proceedings in which the applicant had participated as a prosecutor. The applicant claimed that G. had been represented by lawyers from the same advocates’ union as that to which the applicant’s new supervisor used to belong. The applicant also alleged that the inspection carried out by the Prosecutor General’s Office of her complaints of corruption had been superficial. The second letter concerned an alleged attempt to institute criminal proceedings against the applicant. She also accused a certain prosecutor P. of corruption and abuse of power.

22. On 3 April 2007 the applicant was dismissed from her post under Article 8 § 1 and Article 9 § 5 of the Disciplinary Statute of the Prosecutor’s Office for “misconduct discrediting a prosecutor”. As a reason for dismissal, the order referred to the applicant’s open letter of 15 March 2007 in which she had accused the administration of the department she worked for of corruption and abuse of power. As the applicant had not provided any particular facts in her open letter and given that her allegations had been found unsubstantiated and no criminal proceedings had been instituted, it was concluded that, “ignoring moral and ethical norms, she had for no good reason spread unfounded, wrong and insulting statements about the

employees of the prosecutor's office and the prosecutor's office in general". The order also stated that it had previously been established that the applicant had participated in a civil case about housing fraud in which she had had a personal interest. She had "shown insincerity and had not behaved self-critically". She had published further libellous material and sent further letters to various prosecution authorities commenting on the allegedly unlawful actions of her superiors.

23. The applicant instituted administrative proceedings challenging her dismissal and seeking reinstatement as well as non-pecuniary damages. In her submissions before the domestic courts she claimed that her superiors' actions had been aimed at forcing her retire and that she had therefore felt compelled to protect her rights by challenging the actions of the local prosecutor during the inspection (see paragraph 11 above). As those efforts had proved to be ineffective, she had had to publish an open letter to the Prosecutor General. She claimed also that her dismissal for making use of her right to freedom of expression was in breach of the Constitution and the laws of Ukraine and that it had no factual basis. She also stated that the Prosecutor General's Office had been named by her as a co-respondent because the unlawful actions of the officials of the local prosecutor's office were of a systemic nature. There had already been court decisions allowing claims brought by working and dismissed employees and ordering the payment of damages, but nobody had been held liable for those unlawful actions.

24. Between 5 and 25 April 2007 the applicant published three more letters, one of which contained the text of her dismissal order and her comments on her dismissal.

25. On 29 May 2008 the Prymorskyy District Court of Odesa found in part for the applicant. Referring to the Court's case-law on Article 10 of the Convention, the court found that the applicant's open letters constituted critical remarks in respect of the administration of the Odesa regional prosecutor's office and a general assessment of its actions without an indication of particular facts. The court thus found that those criticisms could not constitute a disciplinary offence of misconduct discrediting a representative of the prosecutor's office. As to the applicant's involvement in a civil case, the court noted that she had already been sanctioned for that. Referring to the Labour Code, the court also noted that when dismissing the applicant, it had not been taken into account that she was a single mother with two minor children. Based on that fact and referring to the provisions of Articles 8 and 9 of the Disciplinary Statute of the Prosecutor's Office, the court ordered the applicant's reinstatement and awarded her compensation for pecuniary and non-pecuniary damage.

26. On 21 October 2008 the applicant was reinstated.

27. On 25 February 2009 the Odesa Regional Court of Appeal, following an appeal lodged by the respondent, quashed the local court's

decision and found against the applicant. The court noted that under the Civil Service Act and the Prosecutor's Office Act, prosecutors had to act in accordance with the requirements of the law. Owing to their status as public servants, only actions directly prescribed by the law were allowed. The restrictions to which prosecutors were subject were meant to ensure the lawfulness of their actions. The court proceeded to analyse the concept of "misconduct discrediting a prosecutor". It noted that while such misconduct was not a criminal offence, "it was by its nature not compatible with the high status of a prosecutor and undermined the authority of the State". The court referred in this connection to the open letters the applicant had published on 15 and 21 March 2007 and held that "it had been correctly established by the [Odesa regional] prosecutor that "for no good reason [the applicant had] spread unfounded, false and insulting statements about employees of the prosecutor's office, [and] allowed the dissemination of confidential and official information relating exclusively to the prosecution authorities". Based on the above reasoning and referring to Articles 2, 8, 9 and 10 of the Disciplinary Statute of the Prosecutor's Office, the court found that the applicant had therefore committed misconduct discrediting her as a prosecutor and undermining the authority of the prosecutor's office, and that her dismissal was therefore lawful.

28. On 3 April 2009, based on the above judgment, the applicant was dismissed again.

29. The applicant appealed in cassation, claiming that she had been dismissed unlawfully and that the appellate court had erroneously applied the law giving preference to the Disciplinary Statute of the Prosecutor's Office and not the Labour Code. In her additional submissions, she also referred to Article 10 of the Convention and claimed that her dismissal was in breach of her right to freedom of expression, as it was, *inter alia*, disproportionate. She stated that in her open letter she had provided her own vision, namely her value judgments, as to the problems within the prosecution system which needed to be discussed by the wider public. She claimed that the prosecution authorities were "uncontrollable" and that, according to certain research, Ukraine was one of the most corrupt States. In this connection, she noted that the appellate court had failed to address these issues, limiting its arguments to general statements. She further asserted that the appellate court had failed to provide sufficient reasons why it had considered her statements abusive and untrue and to indicate the basis on which it had found them to constitute dissemination of confidential information.

30. On 27 April 2010 the Higher Administrative Court of Ukraine upheld the decision of 25 February 2009, essentially reiterating the appellate court's conclusions. It also held that the first-instance court's reference to Article 10 of the Convention as grounds for quashing the dismissal order

was not acceptable, since the applicant was a public servant and her status was defined by special legislation.

31. The applicant then sought leave to have her case reviewed by the Supreme Court of Ukraine on account of divergent application of the law, but the court declined to examine the case.

II. RELEVANT DOMESTIC LAW

A. Constitution of Ukraine

32. Under Article 121 of the Constitution of Ukraine in force at the material time, the public prosecutor's office was defined as a State body which supervised the observance of human and civil rights and freedoms and the observance of laws regulating those issues by executive authorities and local self-government bodies, their officials and officers.

B. Law of Ukraine on the Prosecutor's Office ("the Prosecutor's Office Act") of 1991

33. The relevant provisions of the Prosecutor's Office Act, in force at the material time, read as follows:

Article 46. Requirements for persons appointed as prosecutors and investigators

"Citizens of Ukraine who have higher legal qualifications and the necessary professional and moral qualities can be appointed as prosecutors and investigators. ..."

Article 48. Encouragement and liability of prosecutors and investigators

"...

Prosecutors and investigators shall be liable under the Disciplinary Statute of the Prosecutor's Office, adopted by the Verkhovna Rada of Ukraine, for breaches of the law, improper performance of their official duties or commission of a disreputable act. ..."

C. Disciplinary Statute of the Prosecutor's Office

34. The relevant provisions of the Disciplinary Statute of the Prosecutor's Office, in force at the material time, read as follows:

Article 2

"Employees of the prosecutor's office must have high moral qualities, be principled and irreconcilable to violations of laws, and combine their professional duties with civic courage, justice and incorruptibility. They must personally strictly adhere to the requirements of the law, show initiative in their work, increase its quality and effectiveness, and promote through their activities the assertion of the rule of law and democracy, the forming of citizens' legal consciousness, and respect for laws, norms and rules of public life.

Any breaches by prosecutors and investigators of the rule of law and official discipline undermine the authority of the prosecutor's office and damage the interests of the State and society."

Article 8

"Prosecutors and investigators, as well as employees of educational, scientific and other institutions of the prosecutor's office, shall be subject to disciplinary sanctions for failure to perform or improper performance of official duties, or for misconduct which discredits them as employees of the prosecutor's office. ..."

Article 9

"Disciplinary sanctions are as follows:

- (1) reprimand;
- (2) reduction in grade;
- (3) demotion;
- (4) deprivation of the badge "Honorary employee of the Prosecutor's Office of Ukraine";
- (5) dismissal;
- (6) dismissal with reduction in grade."

Article 11

"The disciplinary sanction should be in line with the degree of guilt and severity of the misconduct. The prosecutor who decides on the imposition of a penalty must personally establish the circumstances of the misconduct and receive a written explanation from the person who committed it. If necessary, an official inspection may be ordered."

D. Labour Code of Ukraine

35. The relevant provisions of the Labour Code, in force at the material time, read as follows:

Article 3. Regulation of labour relations

"The Labour Code regulates the labour relations of all employees of companies, institutions and organisations, regardless of ownership, type of activity or industry sector ..."

Article 147. Sanctions for breaches of labour discipline

"For a breach of labour discipline, only one of the following disciplinary sanctions may be imposed on an employee:

- (1) reprimand;
- (2) dismissal.

[Other] laws, statutes and regulations may provide for other disciplinary sanctions for certain categories of employees."

Article 149. Application of disciplinary measures

“...

For each breach of labour discipline, only one disciplinary penalty may be imposed.

When selecting the type of penalty to apply, the employer or authorised body shall take into account the degree of severity of the misconduct, the circumstances in which the misconduct was committed, and the previous work of the employee ...”

Article 184. Employment guarantees and prohibition on dismissal of pregnant women and women with children

“Dismissal at the initiative of a company owner or an authorised person of pregnant women and women with children under three years old (under six years old – see paragraph 6 of Article 179), or single mothers with children under fourteen years old or a disabled child shall not be allowed, except in cases of full liquidation of the company, institution or organisation, when dismissal with compulsory employment is allowed ...”

E. Other relevant legislation

36. In accordance with Order no. 112^H of the Prosecutor General of Ukraine of 14 July 2006 on the organisation of the implementation by the prosecutor’s offices of the principle of publicity, disclosure of information by the Prosecutor General’s Office to the mass media must have the agreement of the Deputy Prosecutor General; disclosure of information by subordinate prosecutor’s offices must have the agreement of their heads.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

37. The applicant complained that her dismissal from her post as a prosecutor for the publication on the Internet of an open letter to the Prosecutor General of Ukraine in which she criticised the prosecution authorities constituted a breach of her right to freedom of expression as guaranteed by Article 10 of the Convention, which reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

38. The Government contested that argument.

A. Admissibility

39. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

40. The applicant asserted that her dismissal had been the result of the intentional and pre-arranged actions of her superiors, as she had refused to participate in corruption schemes introduced at her workplace. She claimed that the inspections of her activities carried out first by the regional prosecutor and later by a representative of the Prosecutor General's Office had been intended to discover not only any possible mistakes or misconduct in her work, but also some facts from her personal life that could be used against her. The reprimand she had been subjected to had been the first step before her dismissal, and the latter had been meant to serve as an example to her colleagues of what would happen if someone went against the system.

41. The applicant further submitted that she had decided to publish an open letter to the Prosecutor General on the Internet because it had been impossible to raise her point otherwise. She stressed that her complaints submitted to the Odesa regional prosecutor and the Prosecutor General had been left without response; her attempts to have a personal meeting with the former had also been unsuccessful. She pointed out in that connection that no effective mechanism to uncover and suppress corruption activities had existed at that time and that society had needed to know what was going on.

42. The applicant further claimed that the statements in her open letter had been her viewpoint and value judgments in respect of the situation at her workplace and that she had not sought to insult anyone. She had not provided any particular facts or examples of the alleged unlawful activities as she had refused to participate in them. Such facts could only have been obtained, according to her, after an official investigation. She added that none of the persons mentioned in her letters had ever applied to the courts with defamation complaints.

43. The applicant considered her dismissal unlawful, as it had been based on the Civil Service Act, the Prosecutor's Office Act and the Disciplinary Statute of the Prosecutor's Office, and had not taken into account the general labour legislation, which prohibited the dismissal of single mothers. She stressed that the local court had taken that into account, whereas the higher courts had examined the case relying solely on the

special legislation (see paragraphs 25, 27 and 30 above). The applicant further claimed that the Disciplinary Statute of the Prosecutor's Office was outdated (enacted in 1991) and flawed, but provided no further explanations.

2. The Government's submissions

44. The Government agreed that there had been an interference with the applicant's rights under Article 10 of the Convention. However, they regarded the interference as lawful, as domestic law clearly stipulated that prosecutors were subject to certain restrictions and that dismissal might be applied for misconduct discrediting a prosecutor. They further pointed out that the impugned publication of the open letter had been contrary to the Prosecutor General's Order no. 112H of 14 July 2006 on the organisation of the implementation by the prosecutor's offices of the principle of publicity. That order prohibited any disclosure of information to the mass media without the agreement of the head of the relevant prosecutor's office (see paragraph 36 above).

45. The Government further contended that the applicant's dismissal had pursued the legitimate aim of protecting the reputation of others, in this case the prosecutor's office and its employees and other persons mentioned by the applicant in her letters. They referred to the important place and role of the prosecutor's office in the legal system of Ukraine (see paragraphs 32 and 33 above). They also emphasised, relying on the Court's judgment in the case of *Dichand and Others v. Austria* (no. 29271/95, 26 February 2002), that even value judgments had to be based on facts. They stressed, however, that owing to the language used, the applicant's letter had not been a value judgment but a reference to facts which had not been proven. In the latter connection, they referred to the results of the police enquiries finding no evidence of any crime.

46. The Government concluded that the applicant's dismissal had not been disproportionate, as she had breached the order on the publication of material in the media (see paragraph 36 above), had gone beyond acceptable criticism in her statements and had harmed the authority of the prosecutor's office, its employees and certain private individuals. They also pointed out that the applicant had been dismissed not only for that particular publication but also because of previous misconduct. Lastly, they pointed out that the letter had been published on the Internet, which due to its nature made it even more harmful to the reputation of the prosecution authorities.

3. The Court's assessment

(a) The relevant general principles

47. The Court has found on a number of occasions that freedom of expression constitutes one of the essential foundations of a democratic

society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

48. Interference with freedom of expression will breach the Convention if it fails to satisfy the criteria set out in paragraph 2 of Article 10. The Court must therefore determine whether it was "prescribed by law", whether it pursued one or more of the legitimate aims listed in that paragraph and whether it was "necessary in a democratic society" in order to achieve such aim or aims (for a summary of the fundamental principles set out in the Court's case-law concerning freedom of expression, see *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, §§ 75-77, 27 June 2017, with further references).

49. The Court reiterates that the protection afforded by Article 10 of the Convention also extends to the workplace in general and to the public service in particular (see, among other authorities, *Guja v. Moldova* [GC], no. 14277/04, § 52, ECHR 2008; *Kudeshkina v. Russia*, no. 29492/05, § 85, 26 February 2009; and *Langner v. Germany*, no. 14464/11, § 39, 17 September 2015). The Court further reiterates that employees have a duty of loyalty, reserve and discretion to their employer which requires that the dissemination of even accurate information is carried out with moderation and propriety. This is particularly so in the case of public service, since the very nature of public service requires its employees to be bound by such a duty (see *Vogt v. Germany*, 26 September 1995, § 53, Series A no. 323, and *Kudeshkina*, § 93 and *Langner*, § 43, both cited above). Disclosure by civil servants of information obtained in the course of their work, even on matters of public interest, as well as of their criticism, should therefore be examined in the light of their duty of loyalty and discretion (see *Kudeshkina*, § 93 and 94, cited above).

50. At the same time, the signalling by an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the interest which the public may have in particular information is so strong as to override even a legally imposed duty of loyalty. This is especially true if a public servant disclosing it is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large (see *Guja*, cited above, §§ 72 and 74, with further references, and *Heinisch v. Germany*, no. 28274/08, §§ 63, 21 July 2011).

51. When assessing the proportionality of the interference in relation to the legitimate aim pursued the Court has to establish, in particular, whether the reasons given by the national authorities to justify it were “relevant and sufficient”. In doing so, it takes into account a number of factors, namely the public interest involved, the factual basis of the statements, their actual wording and possible interpretations, the applicant’s motive for the statements, whether he or she had any alternative channels for disclosure, the damage suffered by the State authority, if any, and the severity of the sanction applied to the applicant (see *Guja*, cited above, §§ 73-78, and, as regards private employers, *Heinisch*, cited above, §§ 65-70, and *Herbai v. Hungary*, no. 11608/15, § 40, 5 November 2019).

52. Lastly, the Court notes that its task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient”. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 113, ECHR 2015). The absence of an effective judicial review may support the finding of a violation of Article 10 (see *Baka v. Hungary* [GC], no. 20261/12, § 161, 23 June 2016, with further references).

53. The Court will now assess the facts of the present case in the light of the above principles.

(b) Application of the above principles in the present case

54. The Court notes that the protection afforded by Article 10 applies to the statements made by the applicant, in her capacity as prosecutor, in her open letter of 15 March 2007. It follows that the dismissal from office, which was primarily based on those statements, interfered with the applicant’s right to freedom of expression. This was also common ground between the parties. The Court will therefore examine whether the dismissal was justified under paragraph 2 of Article 10 of the Convention.

(i) “Prescribed by law” and legitimate aim

55. The Court notes that the Government relied and the domestic courts referred mostly to the Disciplinary Statute of the Prosecutor’s Office, which

provided for disciplinary sanctions in the event of failure to perform or improper performance of official duties by prosecutors or misconduct discrediting them as employees of the prosecutor's office (see paragraph 34 above). One of the sanctions was dismissal, and the precise disciplinary sanction applied to a person had to be in line with the degree of guilt and severity of the misconduct. There is nothing to suggest that those provisions were not sufficiently clear, accessible and foreseeable for the applicant. As to the applicant's position that the courts had not established which legislation should have been applied to her situation – general employment legislation or special provisions governing the liability of prosecutors – the Court notes that the domestic courts applied the latter provisions and the applicant has not shown that this approach was contrary to established domestic case-law.

56. On the question of legitimate aim, the Court notes that Article 10 § 2 of the Convention lists, as one of the legitimate aims that can justify an interference with the rights protected by that Article, the need to maintain the authority of the judiciary. It is true that the status and functions of the prosecution authorities differ from country to country and the question of whether they belong to the judiciary as such may accordingly have a different answer depending on the country concerned. The Court considers, however, that in the present case it is unnecessary to decide this issue, as the Government have also invoked, as a possible legitimate aim, the "protection of the reputation ... of others". The Court can accept that argument for the purposes of this case.

57. Consequently, the Court is satisfied that the applicant's dismissal was "prescribed by law" and pursued a legitimate aim within the meaning of Article 10 § 2 of the Convention. It remains to be determined whether the interference was "necessary in a democratic society", in particular whether there was a proportionate relationship between the interference and the aim thereby pursued.

(ii) "Necessary in a democratic society"

58. The Court notes that the applicant was dismissed on account of her open letter of 15 March 2007 in which she made public her criticism with regard to elements of alleged corruption in the conduct of local prosecution officials. In particular, she referred to alleged commonplace instances of pressure being exerted on prosecutors to act unlawfully in return for a benefit, or retire if they disagreed, and claimed that the problem should be treated seriously if the prosecutor's office was to enjoy the trust of the public. These statements were seen by the applicant's superiors and the domestic courts as "unfounded, false and insulting statements about employees of the prosecutor's office and the prosecutor's office in general" and "dissemination of confidential and official information relating exclusively to the prosecution authorities" (see paragraphs 22 and 27

above). The Government also claimed that the applicant's account of her new superiors' misconduct was not supported by any evidence and that, on the contrary, the police enquiries conducted following the publication of the applicant's letters had found no evidence of the alleged misconduct and thus no criminal case had been opened (see paragraphs 20 and 45 above).

59. The Court notes that unlike the *Guja* case (cited above), where two letters received by the Prosecutor General's Office were made public, in the present case the applicant's actions cannot be considered as "disclosure" of information to which an employee could have had access in the course of his or her work. The Court further notes that the domestic authorities' approach describing the applicant's statements as "unfounded, false and insulting" and "confidential and official information" appears contradictory. However, neither the domestic courts nor the Government in their observations addressed this possible contradiction. In fact, it was transposed from the dismissal order into court judgments almost unchanged.

60. The Court further notes that the domestic courts provided no analysis whatsoever of the content and reliability of the allegations made in the applicant's letter. The results of the police enquiries, invoked by the Government, were not referred to at all by the domestic courts when assessing the applicant's dismissal. They limited their examination to a mere statement that the applicant had spread unfounded, false and insulting statements and disseminated confidential and official information about the prosecution authorities (see paragraph 27 above) without providing any explanation.

61. That said, the Court reiterates the duty of loyalty and discretion of civil servants to their employers, which requires that the dissemination of even accurate information be carried out with moderation and propriety. However, this duty may be overridden by the interest which the public may have in particular information (see the case-law cited in paragraphs 49 and 50 above). It would appear that in her open letter the applicant raised a very sensitive and important matter of public interest. However, the relation between the applicant's duty of loyalty and the public interest in being informed about wrongdoing and corruption in the system of prosecution authorities was not examined by the domestic courts in detail (if at all). The Odesa Regional Court of Appeal apparently was of the view that civil servants were not allowed, as a matter of principle, to make statements other than those directly prescribed by law (see paragraph 27 above).

62. The Court further observes that the domestic courts failed to analyse the applicant's submissions regarding her repeated attempts to raise her concerns with her hierarchy and verify whether there were any possible alternative means for the applicant to report the wrongdoing she had allegedly witnessed and how this was linked to her motives (see *Herbai*, cited above, § 44). The Court notes that while the Government referred in their observations to the special Order as a document defining the procedure

in the event that a prosecutor intended to make any information public (see paragraphs 36 and 44 above), it appears to have no relevance to the present case because, as was noted above, the applicant did not make any internal information public and, in any case, the Order was invoked for the first time by the Government in their observations and had never been referred to by the domestic authorities, including the courts, to support the applicant's dismissal.

63. On the question of damage suffered by the authority as a result of the applicant's actions, the Court notes that while the Government raised a general argument that her open letter had not only damaged the reputation of the Odesa regional prosecutor, but was also likely to have seriously interfered with the work and reputation of the prosecution authorities in general, this issue was never addressed by the domestic courts.

64. Lastly, the Court notes that the sanction of dismissal was the heaviest one available, and could only be increased by adding a reduction in grade (see paragraph 34 above). It would appear to be a harsh measure, and it must have been extremely distressing for the applicant to have lost access to the profession she had exercised for seven years (see *Vogt*, § 60; *Guja*, § 95 and *Kudeshkina*, § 98, all cited above). However, at no stage of the proceedings did the domestic authorities provide any analysis of the possibility to apply less intrusive sanctions, essentially assuming that the applicant's actions constituting "misconduct discrediting a prosecutor" justified automatic dismissal.

65. The Court considers that when deciding on the application of such a serious sanction to the applicant as dismissal, the domestic courts had to take into account and give a comprehensive analysis of such key elements of the case as the nature and veracity of the statements made by the applicant, her motives for making the impugned publication and the possibility of effectively raising her point before her direct superiors, as well as to establish any damage sustained by the prosecutor's office as a result of the publication. That is essential for establishing whether a fair balance was struck in the applicant's case (see paragraphs 51 and 52 above). However, as can be seen from the Court's analysis in the preceding paragraphs, the domestic courts failed to address the majority of those issues, if any.

66. Having regard to the foregoing, the Court considers that in the circumstances of the case, the national authorities failed to adduce "relevant and sufficient" reasons to justify the applicant's dismissal. Thus, not being accompanied by adequate procedural safeguards, the impugned interference with the applicant's right to freedom of expression was not proportionate to the legitimate aim pursued.

67. There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. The applicant claimed 54,634.40 euros (EUR) in respect of pecuniary damage, made up as follows: EUR 14,637.40 for loss of earnings and salary-related arrears after her dismissal, and EUR 40,000 for the cost of an apartment she could have received as a prosecutor had she not been dismissed.

70. The applicant also claimed EUR 15,000 in respect of non-pecuniary damage.

71. The Government contested those claims, arguing that there was no causal connection between the alleged violation of the Convention rights and the pecuniary loss sustained. The claim in respect of non-pecuniary damage was, in their view, unsubstantiated.

72. The Court does not, on one hand, discern any causal link between the violation found and the pecuniary damage alleged: it therefore rejects this claim. On the other hand, ruling on an equitable basis it awards the applicant EUR 4,500 in respect of non-pecuniary damage.

B. Costs and expenses

73. The applicant also claimed 4,577.83 Ukrainian hryvnias (UAH) (EUR 261.63) for the costs and expenses incurred before the domestic courts and the Court, made up as follows: UAH 420 for travel expenses (travel for the hearings before the Supreme Court), UAH 1,056.83 for postal expenses, and UAH 258 for an expert report prepared in the domestic proceedings. She also claimed UAH 2,843 for translation services (translation of her observations sent to the Court).

74. The Government contested the claims for travel costs and for the expert report, arguing that there was no causal connection between them and the consideration of the case before the Court. As to the postal expenses, the Government argued that the documents provided by the applicant showed neither the sender and recipient, nor the purpose of the payment.

75. 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 have been 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 that the applicant's claims should be allowed in full.

C. Default interest

76. 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 10 of the Convention;
3. *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 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 261.63 (two hundred and sixty-one euros and sixty-three cents), 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;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytkhik
Registrar

Síofra O'Leary
President