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

Press Release
issued by the Registrar of the Court

ECHR 356 (2019)
17.10.2019

The dismissal of civil servants under Ukraine's lustration law led to violations of their rights

The case **Polyakh and Others v. Ukraine** (applications nos. 58812/15, 53217/16, 59099/16, 23231/18, and 47749/18) concerned the dismissal of five civil servants under the Government Cleansing (Lustration) Act of 2014 ("the GCA").

In today's **Chamber** judgment[1] in the case the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights owing to the length of the proceedings in the first three applicants' domestic cases, and

a violation of Article 8 (right to respect for private and family life) of the Convention in respect of all five applicants.

The Court first held that the first three applicants' right to a fair trial had been violated because proceedings on their dismissal had lasted more than four and a half years and were still ongoing.

As for the Article 8 issue, the Court did not doubt that in the period when former President Viktor Yanukovych was in power the Ukrainian civil service and democratic governance had indeed faced considerable challenges which justified a need for reform. However, the Court found in particular that the GCA was of very broad application and had led to the dismissal of the applicants simply for having worked in the civil service for more than a year while Mr Yanukovych was in power or for having been a Communist Party official before 1991.

The law therefore had no regard to the applicants' individual roles or whether they had been associated with any of the undemocratic acts which had taken place under the former president. In that context, Ukraine's Government Cleansing Act differed from more narrowly targeted lustration programs put in place in other Central and Eastern European States.

Principal facts

The applicants, Vyacheslav Polyakh, Dmytro Basalayev, Oleksandr Yas, Roman Yakubovskyy, and Sergiy Bondarenko, are Ukrainian nationals who were born in 1970, 1976, 1954, 1977, and 1957 respectively and live in Kyiv, Mykolayiv, Chernigiv, Yaremche (Ivano-Frankivsk Region), and Oleksandrivka (Donetsk Region) (all in Ukraine).

After the departure from office of former President Viktor Yanukovych as a result of the "EuroMaidan" protests in February 2014, the new government and parliament passed a law, the Government Cleansing (Lustration) Act of 2014, which provided for the dismissal of various categories of officials.

The people concerned were those who had occupied certain positions in the civil service for at least one year from the time Mr Yanukovych had become president in February 2010 to his departure in February 2014, or had held certain positions in the Communist Party of the former Ukrainian Soviet

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Socialist Republic before 1991. Civil servants also had to fill in "lustration declarations" if they were covered by the law.

The first three applicants were dismissed under the GCA in October 2014, based on the fact that they had worked in the civil service in the 2010-2014 period. The fourth applicant was dismissed after failing to file a lustration declaration in time, while the fifth applicant lost his job because he was a second secretary of the Communist Party at the district level before 1991.

In court proceedings brought by the applicants to be reinstated, the first three applicants' cases were suspended in 2014 or 2015 pending a ruling by the Constitutional Court on the constitutionality of the GCA. The other two applicants' dismissals were upheld by the courts in 2018 on the grounds that, among other things, the Constitutional Court had not ruled the law unconstitutional.

According to information available at the time of the Court's examination of the case, the Constitutional Court was still considering the matter of the GCA's constitutionality.

Complaints, procedure and composition of the Court

Relying on the various fair trial guarantees set down in Article 6 (right to a fair trial), the first three applicants complained about the ongoing failure of the domestic courts to examine their claims.

All the applicants complained under Article 8 (right to respect for private life) about their dismissal and the effect it has had on them. The second applicant also raised a complaint of a breach of Article 13 (right to an effective remedy).

The applications were lodged with the European Court of Human Rights on various dates between 21 November 2015 and 3 October 2018.

Judgment was given by a Chamber of seven judges, composed as follows:

Angelika **Nußberger** (Germany), *President*,
Gabriele **Kucsko-Stadlmayer** (Austria),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Yonko **Grozev** (Bulgaria),
Síofra **O'Leary** (Ireland),
Lətif **Hüseynov** (Azerbaijan),

and also Claudia **Westerdiek**, *Section Registrar.*

Decision of the Court

Article 6

The Court decided to examine the first three applicants' case as a complaint about the length of the domestic proceedings, which had lasted more than four and a half years at one level of jurisdiction, including the proceedings before the Constitutional Court on the constitutionality of the GCA.

It noted that the Government had objected that the applications were inadmissible for non-exhaustion of domestic remedies because the applicants' cases were still being dealt with by the courts. Furthermore, the applicants had themselves contributed to the situation by not insisting that the domestic courts resume proceedings and deliver judgments in their cases in the absence of the Constitutional Court's decision on the GCA's constitutionality.

However, the Court held that it was not reasonable to expect the applicants to do so given that the courts had considered that a constitutional ruling was necessary to resolve the applicants' cases, a position endorsed by the Plenary of the Supreme Court.

The applicants could also have undermined their own positions by not waiting for a decision from the Constitutional Court decision against the GCA and they could not have known that the Constitutional Court would exceed the legal time-limits to carry out a review of the bill.

Overall, the applicants could not be blamed for either not opposing the referral of a question to the Constitutional Court or for not asking for the resumption of suspended proceedings.

The Court noted that the specific nature of Constitutional Court proceedings had to be taken into account when considering the length of proceedings, however, that factor could not provide a full explanation for the delay in the applicants' cases.

Firstly, the Supreme Court had asked for an urgent examination of the issue and the Government had not shown that other urgent Constitutional Court cases had had precedence. There had not been any major developments at Constitutional Court level since July 2017, beyond deliberations, nor any convincing explanation of why the statutory time-limits for consideration of the referred question had been exceeded.

The Court concluded that the length of the proceedings in the first three applicants' cases could not be considered as reasonable and rejected the Government's objection of non-exhaustion of remedies. It also held that there had been a violation of the three applicants' right to a trial within reasonable time.

Article 8

The Court first noted that this case differed from other previously decided cases against Central and Eastern European States which related to measures against former alleged collaborators of totalitarian secret services and the specificity of the applicants' situation and the GCA measures had to be taken into account.

The Court found that the measures against the applicants had interfered with their right to respect for their private life. In particular, they had been dismissed, banned from civil service positions for 10 years, and had had their names published in a publicly accessible online Lustration Register.

Those measures had been set out in the GCA, which had been accessible as it had been published and foreseeable in its implications for the applicants.

However, the Court had doubts as to whether the interference had pursued a legitimate aim.

Among other issues, it noted that previous lustration laws had dealt with alleged security service personnel of totalitarian States, whereas the first four applicants had worked for what was in principle a State based on democratic constitutional foundations. The measures had also been based on what appeared to be a sort of collective liability for working under Mr Yanukovych, taking no account of any individual role or link to any antidemocratic developments.

There was a possibility that the law had been passed for reasons of vindictiveness against those who had worked for former Governments, which implied the politicisation of the civil service, which by itself was against the proclaimed purpose of the legislation. It was a well-established Court case-law principle that lustration could not serve for punishment, retribution or revenge and that applied also to the GCA.

Nevertheless, the Court had more concerns about the proportionality of the GCA measures as applied to the applicants. This was part of its consideration of whether they were "necessary in a democratic society".

The first three applicants

The Court noted that the first three applicants had been dismissed owing to having served under the former president, whose time in office had been marked by negative developments in terms of respect for democracy, the rule of law and human rights.

The Court accepted that some changes in the civil service could have been necessary after that period, including steps against individuals who were personally associated with such developments. States in principle had wide discretion ("margin of appreciation") in dealing with the legacy of communism via lustration.

In the case of the applicants, the measures had been very restrictive and of broad scope. Very convincing reasons had thus been required to show that they could be applied without any individual assessment of their actions.

However, the Government had not pointed to any discussion of such reasons in the parliamentary debates on the GCA, which furthermore appeared to lack cohesion between its guiding principles – presumption of innocence and individual liability – and its actual operation.

Other issues were that the GCA was broader than similar measures in other countries, which had only targeted people who had actively worked for the former communist authorities. By contrast, that broad scope had led to the second and third applicants being dismissed, even though they had taken up their civil service posts long before Mr Yanukovych had become president and had simply failed to resign within one year of him taking office.

There was also lack of clarity as to the applicable time-frame: the Government had argued that the law aimed at dealing with the ills caused by all post-communist elites, however, the period from 1991-2010 was excluded from the law's operation. There was also no explanation for why the one-year period was chosen as the criterion for the law's application.

The Government had raised various arguments to support the law, such as the practice of placement of corrupt officials in the civil service under Mr Yanukovych, a 2010 Constitutional Court decision which had increased his powers and the alleged politically motivated persecution of EuroMaidan protesters. However, those issues were of no relevance in the decision to apply the GCA to the applicants. No connection was shown between them and those negative developments.

The Government had argued that it had not been possible to apply the GCA in a more individualised way because of the emergency in eastern Ukraine. However, the GCA was not mentioned in the declaration made by Ukraine under the Convention provision (Article 15) allowing derogation from certain Convention obligations in time of emergency.

While the Court was aware of the situation in Ukraine at the time, it noted that the alleged urgency of the need for the GCA contrasted with the fact that the applicants were to be barred from office for 10 years. Personnel changes might well have been necessary in Ukraine after those events, but there was no sign that the situation would have remained unstable for so long so as to prevent a review of each individual's role and the possible phasing out of restrictive measures over time.

Lastly, the Court noted that the applicants had been removed from office and information about that decision had been made publicly available even before any review of those decisions by courts. The review that had subsequently begun was still going on and had already lasted almost half of the 10-year exclusion period envisaged by the GCA.

The fourth and fifth applicants

The fourth applicant had been removed from office for filing his lustration declaration four days late. If he had been dismissed because of his association with the rule of former President Yanukovych then the considerations set out for the first three applicants applied. If he had been dismissed for the late filing, then that was a disproportionate measure, given the minor technical nature of the applicant's omission.

The fifth applicant had been dismissed because of his former role as a second secretary of a district in the Communist Party.

The Court noted that it had found violations of the Convention in cases against other States where there was a big time gap between a person's alleged involvement in totalitarian structures and lustration measures against them.

It noted that the time gap in the fifth applicant's case was 23 years and that there had been no suggestion of wrongdoing on his part in the past. It concluded that the Ukrainian authorities had failed to provide reasons to justify lustration against people who had merely occupied certain positions in the Communist Party prior to 1991, where there was no allegation of specific antidemocratic activities on their part.

Furthermore, the measure against the fifth applicant had been particularly disproportionate. No serious argument had been made that as a local official working in agriculture he had posed any threat to the newly established democratic regime and the authorities had demonstrated a total disregard for his rights.

In conclusion, the interference with all five applicants' rights had not been necessary in a democratic society and there had been a violation of their rights under Article 8.

Just satisfaction (Article 41)

The Court held that Ukraine was to pay each applicant 5,000 euros (EUR) in respect of non-pecuniary damage. In respect of costs and expenses it awarded EUR 1,500 to the first applicant and EUR 300 each to the second to fifth applicants.

The judgment is available only in English.

Press contacts
echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

Patrick Lannin (tel: + 33 3 90 21 44 18)
Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)
Denis Lambert (tel: + 33 3 90 21 41 09)
Inci Ertekin (tel: + 33 3 90 21 55 30)