



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

FIFTH SECTION

CASE OF SAMSIN v. UKRAINE

(Application no. 38977/19)

JUDGMENT *(Just satisfaction)*

Art 41 • Just satisfaction • Claim for pecuniary damage dismissed • Applicant formulated an entirely different claim from his original one based on facts which occurred after the delivery of the principal judgment • No causal link between new claim and breach found in principal judgment • Original claim not maintained and thus not examined

STRASBOURG

19 October 2023

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

In the case of Samsin v. Ukraine,

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

Georges Ravarani, *President*,

Lado Chanturia,

Mārtiņš Mits,

Stéphanie Mourou-Vikström,

María Elósegui,

Kateřina Šimáčková,

Mykola Gnatovskyy, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having deliberated in private on 26 September 2023,

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

PROCEDURE

1. The case concerns the applicant's dismissal, on 25 April 2017, from the position of judge of the Supreme Court of Ukraine and the measures applied to him under the Government Cleansing (Lustration) Act ("the GCA").

2. In a judgment delivered on 14 October 2021 ("the principal judgment"), the Court held that there had been a violation of Article 8 of the Convention on that account (see *Samsin v. Ukraine*, no. 38977/19, 14 October 2021).

3. Under Article 41 of the Convention, in his submissions prior to the delivery of the principal judgment the applicant claimed EUR 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 200,152 in respect of pecuniary damage. That latter claim was calculated as the sum of:

(i) the amount of the allowance for judges who resigned which he would have received between 1 May 2017 (when he had stopped receiving his salary) and 1 December 2017 (when he had started receiving his general-regime old-age pension); and,

(ii) after the latter date, the difference between the general-regime old-age pension which he had received and the allowance for retired judges, to which he would have been entitled had he been allowed to resign as he had requested, instead of being dismissed under the GCA.

4. The applicant claimed in particular that, had he been allowed to resign, he would have been entitled to an allowance for judges who resigned amounting to 90% of his final salary, which would have been 37,440 Ukrainian hryvnias (UAH) per month initially and would then have increased in line with the increases in the salaries of active judges of the Supreme Court of Ukraine, ordered from December 2018 to March 2020.

5. In its principal judgment the Court awarded the applicant EUR 5,000 in respect of non-pecuniary damage. Since, as regards pecuniary damage, the

question of the application of Article 41 of the Convention was not ready for decision, the Court reserved it and invited the Government and the applicant to submit, within three months, their written observations on that issue and, in particular, to notify the Court of any agreement they might reach (ibid., § 68, and point 4 of the operative provisions). That time-limit was subsequently extended.

6. The applicant submitted modified claims concerning pecuniary damage. Both parties submitted observations.

RELEVANT FACTUAL DEVELOPMENTS SINCE THE PRINCIPAL JUDGMENT

7. On 30 June 2022 the Supreme Court, following an application by the applicant, and in view of the Court's findings in the principal judgment, amended the Supreme Court's judgment of 31 January 2019 (see paragraph 22 of the principal judgment), which had upheld the decision of 25 April 2017 by the High Council of Justice ("the HCJ") to dismiss the applicant, and quashed the HCJ's decision of 25 April 2017 (see paragraph 17 of the principal judgment).

8. On 1 August 2022 Judge V. Gumenyuk (the first applicant in another case decided by the Court, *Gumenyuk and Others v. Ukraine*, no. 11423/19, 22 July 2021), in his purported capacity as acting president of the Supreme Court of Ukraine, issued an order in respect of the applicant. The order, referring to the Supreme Court's decision of 30 June 2022, stated that the applicant would resume performance of his duties as a judge of the Supreme Court of Ukraine from 1 August 2022.

9. On 24 November 2022 the applicant submitted another letter of resignation to the HCJ (his first one having been submitted in July 2016 – see paragraph 14 of the principal judgment).

10. On 15 February 2023 Judge Gumenyuk, acting in the same capacity, issued a certificate to the applicant attesting that arrears for the unpaid salary due to the applicant as a judge of the Supreme Court of Ukraine for the period from May 2017 to 1 August 2022 stood at UAH 13,766,168.57 (before tax). In a separate letter addressed to the applicant, Judge Gumenyuk stated that salary arrears could not be paid since budgetary funding owed to the Supreme Court of Ukraine was being directed to the Supreme Court of Ukraine Abolition Commission instead (concerning relations between that Commission, Judge Gumenyuk and other judges of the Supreme Court of Ukraine, see *Gumenyuk and Others*, cited above, §§ 19 and 84).

11. On 12 January 2023 the HCJ, which had not functioned for a considerable time as a result of an insufficient number of validly appointed members, resumed its work.

12. On 21 February 2023 the HCJ, considering the Supreme Court's decision of 30 June 2022 and the principal judgment in the present case, found

that there had been no grounds for the applicant's dismissal under the GCA and accepted his letter of resignation.

13. The HCJ also determined that, for the purposes of calculation of payments for retired judges, the applicant's judicial career should be deemed to have ended on 30 November 2022 (his sixty-fifth birthday, the date of obligatory retirement for judges under domestic law) and he had the right to monthly payments for retired judges from 1 December 2022. Given that the applicant had first been appointed as a judge in 1987, this meant that he had more than thirty-five years of judicial experience to be counted for calculation purposes.

THE LAW

APPLICATION OF ARTICLE 41 OF THE CONVENTION

14. 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. The parties' updated observations

1. The applicant

15. The applicant submitted modified claims for pecuniary damage referring to the factual developments since the principal judgment. He submitted that the pecuniary damage for which he now sought compensation consisted of his salary as a judge of the Supreme Court of Ukraine, for the period from May 2017 until his reinstatement to the staff of the Supreme Court of Ukraine on 1 August 2022. He pointed out that salary arrears were owed to him for that period (see paragraph 10 above) but, because of the issues identified in *Gumenyuk and Others* (cited above), his prospects of recovering those arrears were uncertain.

16. Therefore, he asked the Court to award him compensation for pecuniary damage based on the amount of salary arrears specified in the certificate issued to him (see paragraph 10 above). Taxes and the amount of general-regime old-age pension the applicant had received would need to be deducted. With those deductions, the amount was UAH 10,247,414.15. The applicant therefore claimed the equivalent of that amount according to his calculation of the exchange rate on 25 February 2023, namely EUR 263,951.

2. The Government

17. The Government pointed to the developments described in paragraphs 7, 8 and 11 to 13 above. They observed that the applicant had

changed his claim in respect of pecuniary damage compared with that submitted earlier in the proceedings (see paragraphs 3 and 4 above). He had not exhausted available domestic remedies in that respect; in particular, he had not lodged a claim for salary arrears under the Labour Code and the Code of Administrative Justice. The Government pointed to examples where domestic courts had awarded salary arrears to officials whose dismissal under the GCA had been held to be unlawful. In the case of some such plaintiffs, the Court had held, in *Kuznetsov and Others v. Ukraine* (nos. 9988/16, 41238/16 and 44703/19, § 45, 12 January 2023 [Committee]), that their complaints under Article 8 were manifestly ill-founded, the applicants having been reinstated and awarded salary arrears.

18. The Government also referred to the Court's judgment in *Polyakh and Others v. Ukraine* (nos. 58812/15 and 4 others, § 333, 17 October 2019), where, at the time the judgment was delivered, the applicants' claims for reinstatement and lost wages had been pending before the domestic courts and the Court had rejected their claims for pecuniary damage, finding no reason to doubt that, following the Court's judgment, the domestic courts would be able to resume the examination of those cases and make appropriate awards in respect of the lost wages.

B. The Court's assessment

19. The Court observes that the applicant based his claim submitted after the delivery of the principal judgment on different considerations from those which had formed the basis of the claim he had submitted at an earlier stage of the proceedings (see paragraphs 3, 4, 15 and 16 above).

20. In this context the Court reiterates that reparation for pecuniary damage must result in the closest possible situation to that which would have existed if the breach in question had not occurred (see *Vistiņš and Perepjolkins v. Latvia* (just satisfaction) [GC], no. 71243/01, § 33, ECHR 2014).

21. In order to determine what that situation would be, guidance can be found in the principal judgment (see *Samsin*, cited above, §§ 17 and 57-59):

“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.

...

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 ...

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."

22. The Court's findings in the principal judgment were limited to the domestic authorities' failure to allow the applicant to resign, as he had requested. The violation found concerned, therefore, the grounds on which the applicant's office as a judge was terminated and not the fact that he ceased to be a judge in 2017. The applicant himself made that the basis of his initial claim for pecuniary damage (see paragraph 3 above).

23. The matters now raised by the applicant in his new claim appear to be based on an allegation that the very termination of his functions as a judge was contrary to his Convention rights – an issue that was not the subject matter of the findings in the principal judgment. The applicant has failed to establish a connection between his new claims and the breach found in the principal judgment (compare *S.C. Antares Transport S.A. and S.C. Transroby S.R.L. v. Romania* (just satisfaction), no. 27227/08, §§ 15-17, 30 May 2017).

26. In other words, the applicant formulated a new claim in respect of pecuniary damage based on facts which occurred after the delivery of the principal judgment and are not related, unlike his original claim, to the grounds on which a violation had been found in his case. The applicant has never attempted to raise that new claim domestically or by submitting an application to the Court.

27. Moreover, the applicant's new claim for pecuniary damage is entirely different from his original claim. Following the principal judgment, the applicant sought to establish at the domestic level (and it would appear that he has been successful), that in the period from 2017 to 2022, he had to be considered an active rather than a retired judge, and thus entitled to remuneration as an active judge, rather than a retired judge's allowance.

28. For the Court, the fundamentally different new claim submitted by the applicant as well as the fact that he has undertaken steps at the domestic level to obtain restoration in his old post and to claim a full salary in that post (rather than a retired judge's allowance) – steps which are in line with his new claim, not the original one – indicate that the applicant does not intend to maintain his original claim. Accordingly, the Court is not called upon to examine it.

29. As regards the applicant's new claim, the Court, for the reasons stated above, cannot grant it, since there is no causal link between the new claim and the breach found in the principal judgment.

30. The Court therefore rejects the applicant's claim in respect of pecuniary damage.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

Dismisses the applicant's claim for just satisfaction in respect of pecuniary damage.

Done in English, and notified in writing on 19 October 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytkhik
Registrar

Georges Ravarani
President