



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

## FIFTH SECTION

### DECISION

Application no. 45467/19  
Ivan Petrovych ZHARCHENKO  
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 12 May 2020 as a Committee composed of:

Gabriele Kucsko-Stadlmayer, *President*,

Mārtiņš Mits,

Anja Šeibert-Fohr, *judges*,

and Victor Soloveytchik, *Deputy Section Registrar*,

Having regard to the above application lodged on 23 August 2019,

Having deliberated, decides as follows:

### THE FACTS

1. The applicant, Mr Ivan Petrovych Zharchenko, is a Ukrainian national, who was born in 1986 and lives in Kharkiv. He was represented before the Court by Mr A.I. Umanets, a lawyer practising in the same city.

#### **A. The circumstances of the case**

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

3. Since 2006 the applicant had been serving as a policeman, most recently at the Pokrovsk Division of the National Police Main Department in the Donetsk Region (hereafter – Pokrovsk police office).

4. On 20 July 2017 an internal investigation was ordered based on the information that a criminal case into abuse of power was opened against several officers of the Pokrovsk police office.

5. On the same day three police officers, including the applicant, were arrested and on 21 July 2017 they were notified of charges in the above-mentioned criminal case.

6. On 11 August 2017 the internal investigation was terminated. In its conclusion it was stated that it had been initiated following the information on the institution of criminal proceedings into abuse of power by certain police officers of the Pokrovsk police office. It was further noted that it had been established in the course of the internal investigation that three police officers, including the applicant, were “linked to the commission of the above crime” and who, seeking to improve their performance rates, falsified evidence which led to the institution of criminal proceedings against innocent persons. It was further noted in this context that the applicant had planted drugs, which he and his colleagues had previously bought from unknown persons in March 2017, on a certain Sh. to later open a criminal case against him. It was stated that these actions had been in breach of the applicable regulations, in particular on police ethics, and had had a negative impact on their reputation as police officers. Finally, it was noted that the applicant had refused to provide any explanations in respect of the events.

7. Based on the above conclusions, it was decided to dismiss the applicant from the police service. Two other officers involved were also dismissed, as well as some of their superiors who failed to properly organise and supervise the activities of their subordinates; some other higher-ranking police officers were also subject to disciplinary proceedings.

8. In the dismissal order of 31 August 2017 it was noted that during the pre-trial investigation into abuse of power it had been established that the applicant had been “linked to the above crime”. It was further noted that the applicant was being dismissed based on paragraph 6 of section 1 of Article 77 of the Law on the National Police of Ukraine due to the

“lack of personal discipline, grave breach of paragraphs 1 and 2 of section 1 of Article 18 of the Law on the National Police and Article 7 of the Disciplinary Statute of the Law-Enforcement Authorities, paragraphs 1.3 and 1.4 of section 1 of the Regulations on the Police Inspectors’ Service of the Ministry of Interior (adopted by the Order of the Ministry of Interior no. 550 of 11 November 2010) as well as the paragraph 1 of Section II of the Police Officers’ Rules of Ethics (adopted by the Order of the of the Ministry of Interior no. 1179 of 9 November 2016), which manifested itself in the transfer of drugs to Sh. in order to open a criminal case against him, and commission of an act which negatively impacts the image of the National Police (...)”.

9. In February 2018 the applicant challenged his dismissal before the courts. He complained that there were numerous irregularities in the procedure of internal investigation and claimed also that while the internal investigation had been ordered based on information about the initiation of criminal proceedings into abuse of office, the actions imputed to him as a disciplinary offence were not covered by the objective elements of the crime of “abuse of office”. In any case, according to him, his guilt could only be established by the court in the framework of the criminal proceedings. In this respect he claimed that the statements in the order for his dismissal concerning the alleged transfer of drugs to Sh. essentially referred to the objective elements of the crime of abuse of office with which he was

charged in the framework of the criminal proceedings and that therefore they had been in breach of his presumption of innocence. The applicant sought his reinstatement and the payment of all the salary-related allowances due to him for the period of forced absence at work.

10. On 3 October 2018 the Kharkiv Circuit Administrative Court rejected the applicant's claims. Having examined the circumstances of the case and the applicable law, the court found that the internal investigation had been conducted correctly. The court further noted that the breach of discipline committed by the applicant violated Article 7 of the Disciplinary Statute of the Law-Enforcement Authorities and Article 18 of the Law on the National Police of Ukraine (see paragraphs 17 and 18 below) and could trigger such a sanction as dismissal, which had been rightly applied in the view of the gravity of the applicant's actions. In reply to the applicant's arguments as to the absence of finding of guilt in the criminal proceedings, the court noted that

“the establishment of the existence or lack of the applicant's guilt in the commission of a crime is not the subject matter of the present case (as this does not belong to the competence of an administrative court) and the dispute arose in the legal relations relating to the application of disciplinary sanctions.”

The court further noted that in the course of the proceedings the applicant had failed to disprove the conclusions of the internal investigation.

11. The applicant appealed. He repeated his arguments as to the breach of the presumption of innocence. He noted, in particular, that

“there is a serious risk of breach of the [applicant's] presumption of innocence because of the presumptions as to the factual circumstances [contained in the conclusions of the internal investigation] that constitute the basis of the criminal charges. Such a decision, while having no prejudicial value, could in the future influence the court during trial [against the applicant]”.

He further claimed that he could not have been held disciplinary liable for the same actions that had not yet been proved in the criminal proceedings.

12. On 13 March 2019 the Second Administrative Court of Appeal rejected the applicant's appeal. It agreed with the lower court's conclusions that the internal investigation and the dismissal based on it were lawful. It further noted that the internal investigation was not aimed at establishing the applicant's guilt of a criminal offence, but a breach by him of the working discipline, which does not depend on the existence of a sentence in a criminal case. The court also emphasised that the applicant was not dismissed due to the commission of a crime (which is a separate basis for dismissal) but as a result of application of a disciplinary sanction. In this respect it referred to paragraph 6 of section 1 of Article 77 of the Law on the National Police of Ukraine (see paragraph 17 below).

13. The applicant appealed in cassation, essentially repeating his previous arguments.

14. On 24 April 2019 the Supreme Court of Ukraine refused to open cassation proceedings, as according to the legislation in force cases related to public service (acceptance to public service, dismissal, etc.) were not subject to cassation appeal unless there existed exceptional grounds, for example: the importance of the case for the uniformity of the case law; the case had great public interest; or was of exceptional importance for the applicant. The applicant, however, did not advance any arguments in support of existence of such exceptional grounds.

15. The applicant provided no information and no documents as to the criminal proceedings against him.

## **B. Relevant domestic law**

### *1. Criminal Code of Ukraine of 2001*

16. Article 365 of the Code reads as follows:

#### **Article 365. Abuse of power or official authority by a law-enforcement officer**

“1. Abuse of power or official authority, that is, deliberate act of a law-enforcement officer, which clearly exceeds the rights or powers conferred on him or her, if they have harmed the rights and interests of citizens protected by law, state or public interests, or interests of legal persons,

shall be punishable by restriction of liberty for a term up to five years or imprisonment for a term of two to five years, with deprivation of the right to hold certain posts or engage in certain activities for a term of up to three years.

2. The actions provided for in paragraph 1 of this Article accompanied by violence or threat of violence, the use of weapons or special means, or painful and degrading acts, but in the absence of signs of torture, -

shall be punishable by imprisonment for a term of three to eight years, with deprivation of the right to hold certain posts or engage in certain activities for a term of up to three years.

3. The actions provided for in paragraphs 1 or 2 of this Article, if they have caused grave consequences, -

shall be punishable by imprisonment for a term of seven to ten years, with deprivation of the right to hold certain posts or to engage in certain activities for a term of up to three years.”

### *2. Law on the National Police of Ukraine of 2015*

17. Relevant provisions of the Law read as follows:

#### **Article 18. Basic duties of a police officer**

“1. The police officer shall:

1) strictly adhere to the provisions of the Constitution of Ukraine, the laws of Ukraine and other normative and legal acts regulating the activities of the police, and the Oath of the police officer;

2) professionally perform their official duties in accordance with the requirements of legal acts, official (functional) duties, orders from the superiors; (...)"

**Article 19. Types of Liability of Police Officers**

"1. In case of commission of unlawful acts police officers shall be subject to criminal, administrative, civil and disciplinary liability in accordance with the law.

2. The grounds and the procedure for bringing police officers to disciplinary responsibility, as well as application of reward measures, shall be determined by the Disciplinary Statute of the National Police of Ukraine, to be approved by law."

**Article 77. Dismissal from Police Service**

"1. Police officer shall be dismissed from the police service and the police service shall be terminated:

(...)

6) in connection with the application of a disciplinary sanction in the form of dismissal from service imposed in accordance with the Disciplinary Statute of the National Police of Ukraine; ...

10) in case of adoption of a court decision imposing liability for a corruption-related administrative offence or a criminal offence; ..."

*3. Disciplinary Statute of the Law-Enforcement Authorities of 2006*

18. According to the Law of Ukraine On Amendments to Certain Legal Acts in Relation to the Adoption of the Law of Ukraine on the National Police of Ukraine (no. 911-VIII of 23 December 2015) the Disciplinary Statute of the Law-Enforcement Authorities remained in force until the adoption of the Disciplinary Statute of the National Police (referred to in Article 77 of the Law on the National Police of Ukraine, cited above). Article 2 of the Statute defined a disciplinary misconduct as non-compliance or inadequate compliance by a police officer with the service discipline. For such misconduct Article 5 envisaged a disciplinary responsibility. Article 7 of the Statute provided that every police officer shall comply with the rules of discipline, in particular, to abide by the laws and the Oath of the Police Officer, to protect citizens' rights, to comply with professional ethics requirements, be honest and independent in professional activities. Article 12 of the Statute provided for a list of disciplinary sanctions that could be applied to the police officers, including the following: oral warning; warning; reprimand; severe reprimand; dismissal from the position; lowering in special rank by one point; dismissal from the police. Article 14 of the Statute described the procedure of application of disciplinary sanctions, including the conduct of the internal investigation.

*4. Regulations on the Police Inspectors' Service of the Ministry of Interior (adopted by the Order of the Ministry of Interior no. 550 of 11 November 2010)*

19. The relevant provisions of the Regulations (as in force at the material time) provided as follows:

“1.3 In their activities the staff of the inspector' service of the police shall be governed by the Constitution of Ukraine, the laws of Ukraine, the acts of the President of Ukraine and the Cabinet of Ministers of Ukraine, the Universal Declaration of Human Rights and the Convention on Human Rights and Fundamental Freedoms and these Regulations.

1.4 The activities of the inspector' service of the police in the framework of the system of the Ministry of the Interior shall be carried out in accordance with the principles of lawfulness, humanism, respect to the person, social justice, cooperation with the workforce, civic organizations and the population, independence from the political parties and other civic associations.”

*5. Police Officers' Rules of Ethics (adopted by the Order of the Ministry of Interior no. 1179 of 9 November 2016)*

20. Paragraph 1 of Section II of the Rules provides that a police officer shall abide by the Constitution and the laws of Ukraine, in particular the anti-corruption legislation, act within the limits of his or her powers and be polite and professional, not breach human rights and freedoms, show respect for human dignity and be just, and inform superiors of the circumstances that make his or her further service for the police impossible.

## COMPLAINTS

21. The applicant complained under Article 6 § 2 of the Convention that according to the conclusions of the internal investigation he was essentially found guilty of the imputed actions and that this fact, as well as his further dismissal, were prejudicial to the criminal proceedings against him.

22. He further complained under Article 6 § 1 of the Convention that the Supreme Court refused to open cassation proceedings in his case disregarding the fact that the applicant's salary constituted his only income and that therefore the case was of great importance for him. Under Article 13 of the Convention the applicant complained about the lack of effective remedy on account of the facts of the case.

23. The applicant finally complained under Article 1 of Protocol No. 1 to the Convention that he was deprived of income because of dismissal.

## THE LAW

### A. Complaint under Article 6 § 2 of the Convention

24. The applicant complained that the internal investigation and his dismissal essentially purported to prove that he was guilty of a crime and that this was prejudicial to the pending criminal proceedings against him. He relied on Article 6 § 2 of the Convention, which reads as follows:

“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”

25. The Court reiterates that the presumption of innocence is infringed if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty (see, among other authorities, *Minelli v. Switzerland*, 25 March 1983, § 37, Series A no. 62). While the principle of the presumption of innocence is one of the elements of a fair criminal trial required by Article 6 § 1, it is not merely a procedural safeguard in criminal proceedings. Its scope is more extensive and requires that no representative of the State or a public authority should declare a person guilty of an offence before his or her guilt has been established by a court (see *Çelik (Bozkurt) v. Turkey*, no. 34388/05, § 29, 12 April 2011, and *Moulet v. France (dec.)*, no. 27521/04, 13 September 2007).

26. The Court has already held that it is neither the purpose nor the effect of the provisions of Article 6 § 2 to prevent the authorities vested with disciplinary power from imposing sanctions on a civil servant for acts with which he has been charged in criminal proceedings, where the acts have been duly established (see *Moulet v. France*, cited above). Nevertheless, if a domestic decision concerning the disciplinary sanctions contains a statement imputing criminal liability to the person concerned, this may raise an issue falling within the ambit of Article 6 § 2 of the Convention (see *Çelik (Bozkurt) v. Turkey*, cited above, § 32).

27. The Court notes that in the present case the applicant was dismissed based on paragraph 6 of Section 1 of Article 77 of the Law on the National Police of Ukraine as a result of application to him of a disciplinary sanction triggered by the acts which amounted to professional misconduct and breach of ethics, and not because he had committed a criminal offence, which is a different ground for dismissal (see paragraphs 8 and 17 above). Before the courts the applicant did not disprove the conclusions of the internal investigation concerning the breach of the relevant rules of conduct of the police officers that was established in his dismissal order of 31 August 2017 (see paragraph 8 above), and referred mostly to the procedural irregularities

during its conduct and the breach of his presumption of innocence (see paragraphs 6, 9 and 11 above).

28. Furthermore, the domestic courts consistently underlined that the applicant had been dismissed for the commission of a disciplinary offence and that the question of the applicant's guilt in the commission of a crime had not been the subject matter of the dispute, and in any case this issue had not belonged to the competence of administrative courts (see paragraphs 10 and 12 above).

29. It is true that the phrase that the applicant "was linked to the commission of crime" was used in the conclusion of the internal investigation and in the applicant's dismissal order (see paragraphs 6 and 8 above). However, the mentioned documents clearly indicated that separate criminal proceedings were pending in that regard, making it clear that there were charges against the applicant but not the finding of his guilt of the criminal offence he was charged with. Furthermore, neither the domestic authorities in charge of the disciplinary proceedings, nor the courts, used any other information from, or made any other findings or statements on, the matters relating to those criminal proceedings which were at that time apparently at the early stages of investigation. Also, while it is true that the actions held against the applicant in the framework of the disciplinary proceedings might have also constituted elements of a crime, he was dismissed for professional misconduct and breach of ethics. Nothing in the language of the statements used or the factual information noted by the domestic authorities in the course of the disciplinary proceedings implied the applicant's guilt in the commission of the criminal offence he was charged with.

30. In the view of the above and following the approach taken in the case of *Nikolova and Vandova v. Bulgaria* (no. 20688/04, §§ 97-101, 17 December 2013) the Court finds that the complaint under Article 6 § 2 of the Convention is manifestly ill-founded and must be rejected pursuant to its Article 35 §§ 3 (a) and 4.

## **B. Other alleged violations of the Convention**

31. The applicant further complained under Article 6 § 1 of the Convention that the Supreme Court refused to open cassation proceeding in his case, disregarding the fact that the applicant's salary constituted his only income and that therefore the case was of great importance for the applicant. The applicant also complained under Article 1 of Protocol No. 1 to the Convention that he was deprived of income because of his dismissal and under Article 13 of the Convention as to the lack of effective remedy in respect of the facts of the case.

32. The Court has examined the above complaints and considers that, in the light of all the material in its possession and in so far as the matters



complained of are within its competence, they do not disclose any appearance of a violation of the rights and freedoms enshrined in the Convention or the Protocols thereto.

33. It follows that these complaints must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 4 June 2020.

Victor Soloveytchik  
Deputy Registrar

Gabriele Kucsko-Stadlmayer  
President