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Department for the Execution of Judgments of the ECHR
DGI - Directorate General of Human Rights and Rule of Law
Council of Europe
F-67075 Strasbourg Cedex
France

15 November 2013

Dear Sir/Madam,

Re: *Oleksandr Volkov v Ukraine* (No. 21722/11)

Further to my previous letter of 15 July 2013, I am writing pursuant to Rule 9(1) of the Committee of Ministers' Rules in relation to the case of *Oleksandr Volkov v Ukraine*, in order to provide you with further information concerning the implementation of this judgment (as regards the payment of just satisfaction and the taking of individual measures).

Payment of just satisfaction

It is recalled that the Court awarded Mr Volkov just satisfaction in respect of non-pecuniary damages of €6,000, and costs and expenses in the sum of €12,000 (having also reserved the question of the payment of pecuniary damages). Just satisfaction was due to be paid within three months of the judgment becoming final – that is, by 27 August 2013.

Mr Volkov has confirmed that a payment by way of non-pecuniary damages was effected on 25 October 2013. The sum of 63,314.15 UAH, was paid into his account. A commission fee of 316.57 UAH was deducted from this total, leaving 62,997.58 UAH. The official Euro exchange rate on 25 October was 1103.4337 UAN per 100 EUR.[1] The applicant accordingly makes three observations:

(i) the sum paid is less than the €6,000 awarded; and

[1] See: http://www.bank.gov.ua/control/uk/curmetal/currency/search?formType=searchFormDate&time_step=daily&date=25.10.2013&execute=%D0%92%D0%B8%D0%BA%D0%BE%D0%BD%D0%B0%D1%82%D0%B8

(ii) the court ordered the payment of €6,000 'plus any tax that may be chargeable' (operative para. 11 (a)(i)).

Furthermore, the Committee of Ministers' practice is clear on the question of commission:

'The unconditional obligation to pay the sums awarded by the Court has consistently been interpreted as meaning that the applicant must receive the whole amount of the said sums. Accordingly, it is for the respondent state to bear the cost of all associated fees, including transfer fees, in principle to the applicant's place of residence or up to the point where the money is credited to his or her bank account' (see Ministers' Deputies, Information documents, *Monitoring of the payment of sums awarded by way of just satisfaction: an overview of the Committee of Ministers' present practice*, CM/Inf/DH(2008)7 final 15 January 2009, para. 122).

(iii) in accordance with operative paragraph 11(b) of the Court's judgment, interest is payable in respect of non-pecuniary damages between 27 August and 25 October (at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points).

A payment of €12,000 representing costs and expenses was also due to be paid by 27 August. However, no such payment has been received to date. Therefore, interest continues to be payable in respect of the sum awarded by way of costs and expenses (since 27 August).

Individual measures – the reinstatement of the applicant

It is recalled that on 24-26 September 2013, at the Deputies' 1179th meeting, in a second decision in respect of this case, the Deputies, decided inter alia as follows:

'considering Ukraine's unconditional obligation to secure the applicant's reinstatement in his previous post of judge at the Supreme Court at the earliest possible date, urged the Ukrainian authorities to fulfil this obligation without delay, also noting the present opportunity of vacancies at the Supreme Court'.

Mr Volkov has still not been reinstated to his position as Supreme Court judge, as expressly required by the European Court judgment.

On 4 July 2013 a draft law on amendments to the Constitution of Ukraine was submitted by the President of Ukraine to the Verkhovna Rada. This draft law, which includes provisions relating to the system of judicial appointments, is currently being considered by the Verkhovna Rada. No comments are being submitted on behalf of the applicant on this draft law in this letter which is confined to the question of individual measures.

As regards reinstatement, the respondent Government's 'Action Plan' (dated 22 July 2013) stated merely that 'the Government is now considering possible ways of resolving this situation, in close cooperation with all domestic authorities involved and with due respect to the domestic regulations'. The respondent Government failed to submit a revised action plan by the end of October, setting out progress achieved, additional measures in response to outstanding questions and providing a provisional timetable for their adoption and implementation, as required by the Decision adopted at the 1179th meeting. Instead, in a brief 'update' letter from the Acting Government Agent, Olga Davydchuk, to Ms Genevieve Mayer, the Head of the Department for the Execution of Judgments, dated 24 October 2013, Ms Davydchuk makes no mention of any specific steps which have been taken in order to reinstate Mr Volkov. She simply refers to the draft law currently before the Verkhovna Rada and states as follows:

'The Government are confident that the adoption of the above law would enable the efficient implementation of individual measures for the execution of Court's judgment in Volkov case and for preventing the violations that are similar to those found in the aforecited judgment in the future'.

At their 1179th meeting, the Deputies noted the 'significant importance' that the President of the Supreme Court had recently confirmed to the applicant that there were two vacancies at the Supreme Court, which accordingly allowed for the applicant's rapid reinstatement. The applicant understands that on 5 November 2013 Valentina Simonenko was elected as a Supreme Court Judge. This appointment is confirmed on the Verkhovna Rada website, at the following address: http://zakon2.rada.gov.ua/laws/show/675-18 As far as the applicant is aware, there remains one vacancy at the Supreme Court.

The draft resolution relating to Mr Volkov's dismissal submitted to the Ukrainian Parliament by the Member of Parliament M.D. Katerynchuk (the draft resolution and explanatory report were attached to my earlier letter of 15 July 2013) has made no substantive progress whatsoever. On 4 September 2013 the Law and Justice Committee of the Verkhovna Rada made a decision to recommend to the Verkhovna Rada that the draft resolution be returned for 'further elaboration' (copy attached). It also recommended that the Verkhovna Rada should apply to the High Qualification Commission and the High Council of Justice for them to 'consider the implementation of individual measures' in Mr Volkov's case.

On 25 July 2013 Mr Volkov lodged an appeal with the Head of the Enforcement of Judgments Office of the State Penitentiary Service of Ukraine in relation to the failure of the Chief State Enforcement Officer to initiate enforcement proceedings as regards his reinstatement (copies of the Decree issued by the Chief Statement Enforcement officer, M. V. Yezhov, dated 27 June 2013, Mr Volkov's complaint of 25 July 2013, his further letter of 22 August 2013 and a letter to Mr Volkov dated 12 September from D. V. Vlasyuk, the Deputy Head of the Enforcement of Judgments Office are attached). As far as Mr Volkov is aware, no action has been taken in response to his complaint.

Summary of the applicant's position

It is recalled that since 27 May 2013, the respondent Government has been subject to the obligation to secure Mr Volkov's reinstatement in the post of judge of the Supreme Court 'at the earliest possible date'. That has not happened. The respondent Government has not been able to refer to any concrete steps which it has taken in order to secure his reinstatement. Indeed, the letter from the Acting Government Agent to the Department for the Execution of Judgments of 24 October makes no mention whatsoever of the question of reinstatement. The Acting Government Agent merely states that the adoption of the draft law on Constitutional amendment which is currently before Parliament 'would enable the efficient implementation of individual measures'.

It is noted that neither in the 'Action Plan' nor in the 24 October letter has the respondent Government explained what the process of reinstatement involves. Nor has the respondent Government suggested that there are any obstacles that prevent Mr Volkov being reinstated.

Furthermore, in a letter dated 22 August 2013 to Mr S. V. Kivalov, the Chairman of the Law and Justice Committee of the Verkhovna Rada (copy attached), the Minister of Justice, Olena Lukash, also suggests that Mr Volkov's reinstatement would not be effected until after the draft law has been adopted. Referring to the implementation of the various amendments proposed in the draft law, the Minister states as follows:

> 'The MoJ equally believes that the above-mentioned will make possible the consideration of the applicant's judgeship by the new composition of the HQC established under the standards of the Convention for the Protection of Human Rights and Fundamental Freedoms. Besides, it is necessary to examine the need to review the case of O.F. Volkov on the merits as part of this process, as previously there had been no evaluation of his reviewing the judgments of a judge – his relative, while serving as a Supreme Court Justice'.

The clear implication of the Minister's letter is, accordingly, that notwithstanding the legal obligation to reinstate Mr Volkov as a Supreme Court judge, there will nevertheless be some form of 'review' of his case 'on the merits'. This suggests that the Minister is proposing to re-open and re-evaluate the case brought against Mr Volkov which led to his dismissal. However, the proceedings brought against him have already been the subject of a detailed examination by the European Court and led to the Court finding four separate

violations of Article 6(1) of the Convention and a violation of Article 8. There is no justification whatsoever for a further review of Mr Volkov's case 'on the merits'.

In failing to have reinstated Mr Volkov, the respondent Government is in flagrant breach of a binding judgment of the European Court of Human Rights. Since the judgment became final on 27 May the Government has simply prevaricated, showing no real intention to secure his reinstatement. Furthermore, the Minister of Justice's letter of 22 August (to Mr Kivalov) suggests that the Government may be seeking to avoid its obligation to reinstate, by re-opening the case against Mr Volkov.

Accordingly, the Ministers' Deputies are urged to consider using all the means available to them in order to ensure that Ukraine complies with its obligations under the Convention.

The Ministers' Deputies are called upon to invoke the infringement proceedings mechanism, pursuant to Article 46(4) of the Convention, which provides as follows:

> If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two-thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

Article 46(4) was introduced into the Convention when Protocol No. 14 entered into force on 1 June 2010.

The Explanatory Report to Protocol No. 14 explains the genesis of the new procedure in this way:

> 'Rapid and full execution of the Court's judgments is vital. It is even more important in cases concerning structural problems, so as to ensure that the Court is not swamped with repetitive applications. For this reason, ever since the Rome ministerial conference of 3 and 4 November 2000 (Resolution I), it has been considered essential to strengthen the means given in this context to the Committee of Ministers. The Parties to the Convention have a collective duty to preserve the Court's authority – and thus the Convention system's credibility and effectiveness – whenever the Committee of Ministers considers that one of the High Contracting Parties refuses, expressly or through its conduct, to comply with the Court's final judgment in a case to which it is party' (para. 98).

The Explanatory Report also states as follows:

> 'This infringement procedure does not aim to reopen the question of violation, already decided in the Court's first judgment. Nor does it provide for payment of a financial penalty by a High Contracting Party found in violation of Article 46, paragraph 1. It is felt that the political pressure exerted by proceedings for non-compliance in the Grand Chamber and by the latter's judgment should suffice to secure execution of the Court's initial judgment by the state concerned.
>
> 'The Committee of Ministers should bring infringement proceedings only in exceptional circumstances. None the less, it appeared necessary to give the Committee of Ministers, as the competent organ for supervising execution of the Court's judgments, a wider range of means of pressure to secure execution of judgments. Currently the ultimate measure available to the Committee of Ministers is recourse to Article 8 of the Council of Europe's Statute (suspension of voting rights in the Committee of Ministers, or even expulsion from the Organisation). This is an extreme measure, which would prove counter-productive in most cases; indeed the High Contracting Party which finds itself in the situation foreseen in paragraph 4 of Article 46 continues to need, far more than others, the discipline of the Council of Europe. The new Article 46 therefore adds further possibilities of bringing pressure to bear to the existing ones. The procedure's mere existence, and the threat of using it, should act as an effective new incentive to execute the Court's judgments. It is

foreseen that the outcome of infringement proceedings would be expressed in a judgment of the Court' (paras. 99-100).

It is accordingly submitted on behalf of the applicant that the reasons why infringement proceedings should be brought in this case are as follows:

(i) The obligation to 'secure the applicant's reinstatement in the post of judge of the Supreme Court at the earliest possible date' was included in the operative provisions of the Court's judgment (operative provisions, para. 9).

(ii) The respondent Government has failed to comply with the order to reinstate.

(iii) The respondent Government has also failed to engage seriously with the Committee of Ministers' supervision process as regards the question of reinstatement: at no stage has it explained the procedure for reinstatement, or whether there are any obstacles to reinstatement. The Minister of Justice has also suggested that the original case against Mr Volkov (which was the subject of the European Court judgment) may have to be re-opened.

(iv) The application of infringement proceedings is entirely appropriate because the individual measure in question (reinstatement) is very clear and specific. Nor does it represent any bureaucratic or financial burden on the State.

(v) Rule 11 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (10 May 2006) provides that 'infringement proceedings should be brought only in exceptional circumstances'. The application of infringement proceedings is warranted in this case because it is 'very exceptional', as was noted by the Court itself (para. 208 of its judgment). It was the exceptionality of the case that led the Court to order reinstatement – the first and only time that it has done so.

I should be grateful if you would kindly acknowledge safe receipt of this letter.

Yours faithfully,

Prof. Philip Leach
Director, EHRAC
(Mr Volkov's legal representative)