



Supporting Ukraine in execution of judgments of the European Court of Human Rights

BRIEF OVERVIEW

OF THE STANDARDS OF THE COUNCIL OF EUROPE AS TO THE ASSESSMENT OF A LEGALLY VALID JUDICIAL DECISION OF A JUDGE DURING THE PROCEDURE OF JUDICIAL EVALUATION

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I. REQUEST

The High Qualification Commission of Judges of Ukraine requested an opinion on the standards of the Council of Europe regarding the assessment of a legally valid judicial decision of a judge during the procedure of judicial evaluation and if the conclusion of such assessment can be a ground for taking a decision concerning the future career of the judge.

II. STANDARDS OF THE COUNCIL OF EUROPE

Assessment of individual judges is used to evaluate the abilities of the individual judges, as well as the quality and quantity of the tasks which they have completed. The assessment may be used to give a feedback to the judge, to identify the training needs and it may be used to seek out suitable candidates for a vacant position.¹

The appointment and promotion of judges should be based on objective criteria, in particular, ability, integrity and experience.² Respecting these requirements during an assessment for the promotion of a judge will be necessary. An assessment may also be necessary in connection with a disciplinary procedure. And last but not least, an assessment can also be seen as a part of accountability of the justice system towards society.³

However, there may be a conflict between the necessity of assessment and the necessity to respect the principle of independence of the judge. The Consultative Council of European Judges of the Council of Europe (CCJE) in its Opinion 17 “On the evaluation of judges’ work, quality of justice and respect for judicial independence” clearly states that “*the fundamental rule for any individual evaluation of judges must be that it maintains total respect for judicial independence*”.⁴

Delivering decisions is the core of the task of the judge. It is his/her final summary of establishing the facts, weighting the evidence and interpreting the law. It is here, where the protection of the necessary independence of the judiciary has one main focus. Therefore, European and international standards stipulate that it is only up to the appeal system to assess the merits of the case and if in this regard the decision is seen as correct or wrong:

- In the conclusions of its Opinion 11 “On the quality of judicial decisions” CCJE clearly stresses “*that the merits of individual judicial decisions are controlled by the appeal or review procedures available in national courts and by the right of access to the European Court of Human Rights*”⁵ and: “moreover, evaluation systems must not challenge the legitimacy of judicial decisions.”⁶
- The same principle is included in point 4 of the UN Basic Principles of the Independence of the Judiciary.

1 CCJE Opinion No 17 “On the evaluation of judges’ work, quality of justice and respect for judicial independence”, para 7.

2 CCJE Opinion No 1 “On standards concerning the independence of the judiciary and the irremovability of judges”, para 17 and 29; UN Basic Principles on the Independence of the Judiciary, para 13.

3 CCJE Opinion No 17 para 7.

4 CCJE Opinion No 17 para 6.

5 CCJE Opinion No 11 “On the quality of judicial decisions”, Conclusions lit q.

6 CCJE Opinion No 11 “On the quality of judicial decisions”, Conclusions lit t.

- The Council of Europe’s European Commission for Democracy through Law (the Venice Commission) puts it as follows: “*The Venice Commission underlines the principle that judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other body outside the time limit for an appeal.*”⁷
- Such restriction not to deal with the merits of a case outside the appeal system is also reflected in the limitations, which form the European standards in disciplinary procedures. Recommendation 2010/12 of the Committee of Ministers of the Council of Europe “On judges: independence, efficiency and responsibilities” states that “*the interpretation of the law, assessment of the facts or weighting of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.*”⁸ The same statement is provided in Opinion 3 of the CCJE, especially para 76.⁹

III. CONCLUSIONS

Based on the European standards, listed under section II above, the following provisions as far as the request mentioned under section I above can be formulated:

1) Assessment of a legally valid decision

Outside the system of remedies, which are provided by the national procedural codes or the procedures which may lead to an application for a decision of the European Court of Human Rights or another international court, the correctness of a final decision should not be questioned. This would infringe the independence of the judiciary and challenge the legitimacy of the judicial decisions at large. Legal certainty, which is an essential element of the rule of law, would also suffer. Therefore, an assessment of a judge should not deal with this aspect of his or her decision. It should not be possible that during an assessment procedure the body or the person in charge of the assessment examines if a final decision is “right” or “wrong”.

This does not mean that the quality of judicial decisions under no circumstances could be evaluated during an assessment procedure. CCJE dealt with the quality of judicial decisions in its Opinion 11. Aspects of the quality of a judgment, which can be examined are: the clarity of the decisions¹⁰, the fact if a decision is reasoned (except cases, in which the procedural code allows otherwise)¹¹, if the orders, which are contained in the decision, are formulated in a way which makes them enforceable¹², if the relevant arguments which the parties put forward are considered in the reasoning (without dealing with the content of the arguments and the reasoning)¹³, as far as this is necessary for the case¹⁴.

7 Venice Commission’s Report on the Independence of the Judicial System, Part I : the Independence of Judges; para 67.

8 Recommendation CM Rec (2010) 12 of the Committee of Ministers “On judges: independence, efficiency and responsibilities”, para 66.

9 CCJE Opinion No 3 “On ethics and liability of judges”, see the principles and rules governing judges’ professional conduct, in particular ethics, incompatible behaviour and impartiality, para 76.

10 CCJE Opinion No 11 conclusions lit k.

11 CCJE Opinion No 11 conclusions lit m.

12 CCJE Opinion No 11 conclusions lit p.

13 CCJE Opinion No 11 para 38 to 41.

2) Decisions and the suspicion of a criminal or disciplinary offence

If a judicial decision is erroneous as a result of malice on the part of the judge, the judge is criminally and disciplinarily liable. In some member States, disciplinary liability is also incurred in cases of gross negligence. If such an offence has been formally established, this certainly has to be taken into account when the judge concerned is assessed. Such findings have a bearing on the evaluation of the criterion 'integrity' rather than the criterion 'ability'. In such situations it is not within the competence of the body or the person in charge of the assessment to establish such an offence. It is within the competence of the judicial authority in charge of investigating and adjudicating criminal and disciplinary offences to establish such malice (in various countries it may be criminal judges, or disciplinary chambers, or courts). Even in these cases, it is not the content of the judicial decision being assessed which primarily leads to criminal or disciplinary procedures but the way and intention, which caused the judge to decide in this way. If such wrongful behaviour of a judge is established, this at the same time means that there was a fundamental infringement of the procedural provisions in the procedure which led to the decision (a decision by a partial, biased or not independent judge). In many member States, the procedural codes provide an extra-ordinary remedy in such cases, which allows to re-open the case and challenge the decision, in the course of which the content and the correctness of the decision will be checked by a competent new judge or a panel of judges.

3) Assessment of decisions which were declared as wrong by the competent superior court, when deciding on a remedy

Even the decisions which were declared as wrong by the competent superior court, when deciding on a remedy, must be approached with the outmost caution if they become an object within an assessment procedure. This decision should not be an automatic obstacle for a positive result of the assessment if there is a different view of a judge on the establishment of the facts or the interpretation of the law. The CCJE states: *"Both the limited number of appeals and the number of successful appeals can be objectively ascertainable and relatively reliable quality indicators. However the CCJE stresses that neither the number of appeals nor their rate of success necessarily reflects on the quality of the decisions subject to appeal. A successful appeal can be no more than a different evaluation of a difficult point by the appeal judge, whose decision might itself have been set aside had the matter gone to a yet higher court."*¹⁵

In the same sense also the Committee of Ministers in its Recommendation (2010)12 states that *„judges should not be personally accountable, where their decision is overruled or modified on appeal"*¹⁶.

These aspects of dealing with decisions, which were changed on appeal, must be applied to all kinds of remedies, even if the final decision was a decision of the Supreme Court or a Court of Cassation, and even if it was the judgment of an international court.

It is therefore not in line with this requirement, if each decision of a judge, which led to the finding of a violation by the respective member State before the European Court of Human Rights, is seen automatically as a negative result for the assessed judge who had delivered the national judgment.

14 ECtHR Boldea vs. Romania 15.2.2007 § 29.

15 CCJE Opinion No 11 para 74.

16 Recommendation CM Rec (2010) 12, para 70.

The Venice Commission has dealt with this aspect in an Amicus Curiae Brief for the Constitutional Court of the Republic of Moldova.¹⁷ The Venice Commission underlines that *“liability of judges brought about by a negative judgment of the ECtHR should therefore only be based on a national court’s finding of either intent or gross negligence on the part of the judge. The judgment of the ECtHR should not be used as the sole basis for judge’s liability.”*¹⁸ The Venice Commission concludes that *“holding judges liable for the application of the ECHR without any assessment of individual guilt may have an impact on their independence, which includes giving them the professional freedom to interpret the law, assess facts and weigh evidence in each individual case.”*¹⁹

IV. SUMMARY

In accordance with the Council of Europe’s standards, the question if a decision of a judge is right or wrong should be decided exclusively within the system of procedural remedies. If it is done in the course of an assessment procedure it will have a negative impact on the independence of the judiciary.

It is within the competence of the judicial bodies to establish criminal or disciplinary liability of judges and not the task of a body in charge of assessments.

If in the course of national or international remedies a judgment is modified, this should not automatically lead to a negative assessment of the judge who delivered this decision.

17 Venice Commission Amicus Curiae Brief for the Constitutional Court of Moldova 10./11.6.2016, CDL-AD (2016) 015.

18 VC Amicus Curiae Brief para 77 lit b.

19 VC Amicus Curiae Brief para 79.