



ЕТИЧНА РАДА

01601, м. Київ, вул. Липська, 18/5,
тел.: (044) 277-76-29, (044) 277-76-32
e-mail: ec@court.gov.ua

ETHICS COUNCIL

01601, Kyiv, Lypska St., 18/5,
tel.: (044) 277-76-29, (044) 277-76-32
e-mail: ec@court.gov.ua

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Kyiv

DECISION

No. 22

***On non-compliance of candidate
for the position of the member of the High Council of Justice
Svitlana Mykolaivna Kustova
with the professional ethics and integrity criteria
for filling in the position of the member of the High Council of Justice***

The Ethics Council consisting of Chair of the Ethics Council Lev Kyshakevych, Deputy Chair of the Ethics Council Sir Anthony Hooper, members of the Ethics Council: Robert Cordy, Volodymyr Siverin, Lavly Perling, Yurii Triasun, remotely by videoconference, having conducted evaluation of compliance of candidate for the position of the member of the High Council of Justice Svitlana Mykolaivna Kustova with the criteria of professional ethics and integrity, according to the Law of Ukraine “On the High Council of Justice”, the Rules of Procedure of the Ethics Council adopted by the Ethics Council’s Decisions No. 1 of 01.12.2021 and No. 4 of 09.12.2021, as amended by the Ethics Council’s Decision No. 4 of 26.04.2022, Methodology for assessing compliance of the candidate for the position of a member of the High Council of Justice and sitting members of the High Council of Justice with the criterion of professional ethics and integrity adopted by the Ethics Council’s Decision No. 5 of 09.12.2021 (“the Methodology”),

has established:

According to part 14 Article 9¹ of the Law of Ukraine “On the High Council of Justice” the Ethics Council selects candidates for the positions of the member of the High Council of Justice in two stages:

1) selection of candidates pursuant to results of consideration of documents submitted by candidates, results of the special check and respective information from open sources, and formation of the list of candidates admitted to the interview;

2) conduct of interviews with selected candidates and determination of the list of candidates recommended to bodies which elect (appoint) members of the High Council of Justice.

The Ethics Council received copies of documents submitted by Svitlana Mykolaivna Kustova for participation in the competition for the position of the member of the High Council of Justice nominated by the President of Ukraine and admitted her to the interview with Decision No. 3 of 20.01.2023.

Having studied documents provided by Svitlana Mykolaivna Kustova for participating in the competition, her written explanations and documents provided upon the Ethics Council’s request, information obtained from open sources and from civil society organizations, information received from the National Agency for Corruption Prevention (“the NACP”) and the National Anti-Corruption Bureau of Ukraine (“the NABU”), having conducted the interview with her, the Ethics Council has reached the following conclusions.

1. Regarding not declaring the right to use real property in Kyiv

During the interview, the candidate acknowledged that during the period from 2016 to 2020, she was a party to a rental agreement, according to which S.M. Kustova leased a 50,1 sq. m. residential premises in the Pushcha-Vodytsia

recreation complex of the State Management of Affairs, located at the following address: 150, Vyshhorodska Street 150, Kyiv. According to S. M. Kustova, her mother, who currently lives there, has been a party to the rental agreement since 2020.

In addition, according to the Unified Register of Advocates of Ukraine (hereinafter - the URAU), the specified address is also the address of the workplace of S. M. Kustova as a lawyer. At the request of the Ethics Council, the candidate stated that the address: 150 Vyshgorodska Street, Office 108, Kyiv, has been her registered workplace since 2019.

However, no information confirming the right to use the premises is available in Section 3 "Real Property" of the assets declarations of S.M. Kustova for 2017, 2018, 2019, 2021.

As explained by the candidate, she believed that she was not obliged to declare the said premises since she did not use this property as of the last day of the reporting period or more than half of the days of such period and did not make a one-time payment for the premises under the rental agreement that would exceed 50 non-taxable minimum incomes.

However, such explanations of the candidate do not meet the requirements of anticorruption legislation. According to para 2 of Article 46(2) of the Law of Ukraine "On Prevention of Corruption", the declaration shall contain information on real property owned by the declarant as private property or leased or otherwise used by the declarant, regardless of the form of the transaction that resulted in the acquisition of such right. Furthermore, in accordance with para 3.2 of the Rules of Procedure for Keeping the Unified Register of Advocates of Ukraine, in order to enter information into the URLU regarding the address of the workplace, the lawyer must submit a document confirming the address of his or her workplace to the Bar Council.

Given the above, the Ethics Council believes that candidate S.M. Kustova negligently approached compliance with the financial control requirements set forth in the anti-corruption legislation.

According to cl. 1.3.7.6 of the Methodology, the candidate shall comply with applicable requirements of financial control that are stipulated by the anticorruption legislation, including the provision of full and accurate information in assets declarations.

According to cl. 1.3.4.1 of the Methodology, the candidate fails to comply with the indicator of diligence, in particular, in the case when there are reasonable doubts that such candidate in the professional capacity has acted in line with requirements of the legislation, professional ethical rules, and other ethical norms regarding diligence.

Given that, S. M. Kustova did not indicate information about the right to use the premises that she had been leasing from 2016 to 2020 and which address is registered with the USLU as the address of her workplace as an attorney in her assets declarations, the Ethics Council has reasonable doubts about the candidate's compliance with such indicators of professional ethics and integrity as diligence (cl. 1.3.4 of the Methodology) and compliance with the requirements of financial control regarding the provision of complete and accurate information in assets declarations (cl. 1.3.7.6 of the Methodology).

2. Regarding not declaring membership in the Ukrainian National Bar Association

According to the USRLA, S.M. Kustova received a certificate of attorney No. 2985/10 according to the decision of the Kyiv Regional Qualification and Disciplinary Commission No. 132 dated 17.11.2005.

According to Article 45 (6) of the Law of Ukraine "On the Bar Legal Practice", all persons who hold a certificate of the right to practice law become

members of the Ukrainian National Bar Association from the moment of its state registration (19.11.2012).

According to para. 12 of Article 46 (1) of the Law of Ukraine "On Prevention of Corruption" the information to be indicated in the declaration includes the following: participation of the declarant in management, revisionary or supervisory bodies of public associations, charities, self-regulatory or self-governing professional associations, membership in such associations (organizations), specifying the name of the relevant associations (organizations) and their code from the Unified State Register of Legal Entities and Individual Entrepreneurs.

According to cl. 186 of the Clarifications of the NACP on the application of certain provisions of the Law of Ukraine "On Prevention of Corruption" regarding measures of No. 11 dated 29.12.2021, the Ukrainian National Bar Association (hereinafter referred to as UNBA) is included in the list of associations (organizations) whose membership shall be reported in the declaration.

Despite the fact that S.M. Kustova has had the right to practice law since 2005 and has become a member of the UNBA since 2012, in her assets declarations for 2017, 2018, 2019 and 2021, she did not provide information about her membership in the UNBA, as provided in cl. 12 of Article 46 (1) of the Law of Ukraine "On Prevention of Corruption".

The candidate explains the failure to indicate such information in her declarations by the fact that she did not consider it necessary to declare her membership in the specified professional organization, since all Ukrainian lawyers have already been members of the UNBA, and the NACP Clarifications on declaring such information were provided as late as 29.12.2021.

The Ethics Council assesses such explanations of the candidate critically, since the obligation to indicate that the declarant is a member of the UNBA is specified in para. 61 of the NACP Clarifications on the Application of Certain

Provisions of the Law of Ukraine "On Prevention of Corruption" regarding Measures of Financial Control, approved by the NACP decision of 11.08.2016 No. 3.

Therefore, the candidate was bound to declare her membership in the UNBA in her declarations for 2017, 2018, 2019, and 2021, but she failed to provide such information, violating thereby the requirements of anticorruption legislation.

According to cl. 1.3.7.6 of the Methodology, the candidate shall comply with applicable requirements of financial control that are stipulated by the anticorruption legislation, including the provision of full and accurate information in assets declarations.

According to cl. 1.3.4.1 of the Methodology, the candidate fails to comply with the indicator of diligence, in particular, in case when there are reasonable doubts that such candidate in the professional capacity has acted in line with requirements of the legislation, professional ethical rules, other ethical norms regarding diligence.

In view of the above, since the candidate failed to provide complete and accurate information in her declarations and did not declare her membership in the UNBA in the declarations for 2015, 2017, 2019 and 2021, the Ethics Council has reasonable doubts about her compliance with such indicators of professional ethics and integrity as diligence (cl. 1.3.4.1 of the Methodology) and compliance with the requirements of financial control (cl. 1.3.7.6 of the Methodology).

3. Regarding the legality of the sources of origin of the assets and the compliance of the standards of living of the candidate's family members with the declared income

According to cl. 1.3.7. of the Methodology, sources of origin of the candidate's property are legal, the candidate's level of life or that of his family

members corresponds to their declared and legal incomes, and the candidate's lifestyle corresponds to their status in case there are no reasonable doubts to the contrary.

When assessing candidate S. M. Kustova, the Ethics Council has identified a number of circumstances that raise the reasonable doubts about the compliance of the candidate with the criteria of professional ethics and integrity.

In particular, the Ethics Council has reasonable doubts about the compliance of the candidate with the requirements of financial control and the compliance of the candidate's standard of living with the declared income (cl. 1.3 of the Methodology).

In the declaration for 2021, candidate S.M. Kustova indicated that she had received loans in the amount of UAH 180 000 and UAH 51 000. According to the declaration, in 2021, Kustova S.M. paid interest in the amount of UAH 69 600 and UAH 12 845, which amounts to UAH 82 445 in total. During the interview, the candidate informed the Ethics Council that the source of funds for the interest payment was family savings and partially credit resources.

At the request of the Ethics Council, S.M. Kustova also provided information on the approximate expenses of her family in 2021. According to the candidate's explanations, the amount of expenses in 2021 amounted to approximately UAH 281 200.

Whereas the official income of S.M. Kustova amounted to UAH 89 774 before taxes based on the State Register of Individual Taxpayers in 2021 amounted to UAH 89 874 before tax (an average of UAH 7 500 per month).

In addition, no information on the official income of S. M. Ovcharuk, who was the candidate's husband from 2007 to July 2021 and is the father of their daughter, born in 2008, has been available in the State Register of Individual Taxpayers since 2017.

When assessing candidates' compliance with the criteria of professional ethics and integrity, the Ethics Council uses information on official income

available in state registers. The Ethics Council may take into account other information about income, but the candidate is required to provide reliable confirmation of such information.

In her written explanations and during the interview, the candidate reported that S. M. Ovcharuk has been living and working in the United States since 2016, and in 2017, 2020, 2021, he had transferred funds to her in the amount of USD 3 000, USD 4 800, and USD 4 000, respectively via international money transfer systems. That being said, S.M. Kustova provided the Ethics Council with a photo of a receipt of 2022 for USD 250 and a screenshot of her phone, which cannot be used to identify either the content of the document or the amount of the transfer.

Therefore, the candidate failed to provide documentary evidence of the funds transferred to her by S.M. Ovcharuk. Proceeding from this, it seems doubtful that the candidate has sufficient official funds to support her minor daughter, repay interest for the use of credit funds, maintain the property declared by the candidate, travel abroad and bear living expenses.

Given such circumstances, the Ethics Council believes that there is a reasonable doubt that the candidate's standard of living corresponds to her declared and legal income (cl. 1.3.7 of the Methodology).

4. Regarding independence and impartiality due to the political ties

The candidate has been cooperating with various political parties and individual politicians. Thus, the candidate was an aide-consultant to the Members of Verkhovna Rada of Ukraine the IV-VIII convocations; in 2007 she was running as a candidate for the position of the Member of the Parliament to Verkhovna Rada of Ukraine from the political party; in 2014, she was a representative of the candidate for the position of the President of Ukraine in the Central Election

Commission, and in 2018-2019 she was a member of the Central Election Commission under the quota of the political party.

Answering the question from the Ethics Council on whether the candidate considers such an activity as a political one, the candidate denied this suggestion. She explained that all cooperation with the members of the Parliament of Ukraine was related exclusively to legislative work, in particular, she personally "pushed" the bill on the state financing of the extra-parliament political parties, which later on was adopted by the Verkhovna Rada of Ukraine.

On the Ethics Council's opinion, participation in the electoral processes, gaining of the status and power of the representative of the candidate for the position of the President of Ukraine, and also of the member of the Central Election Commission under the political party quota and "pushing" of the bills has the rises of the political activity of the candidate and her participation in the political processes.

In accordance with the cl. 1.3.2 of the Methodology, honesty shall mean the presence of high moral qualities, and truthfulness in professional activities and in everyday life.

The refusal of S. M. Kustova to acknowledge that she was involved into conscious political activity raises reasonable doubt about the truthfulness of the answers the candidate to the EC's questions, and her compliance with such criteria of the professional ethics and integrity as honesty (cl. 1.3.2 of the Methodology).

Also, the EC points out that during the interview the candidate indicated that she considers her dismissal from the position to be unlawful (this situation had place in 2019, when Verkhovna Rada of Ukraine under the proposal of the President of Ukraine decided on the termination of the powers of all the members of the Electoral Commission early). During the interview, the candidate noted that one of the aspects of her motivation for participating in the competition for the position of a member of the High Council of Justice under the President's quota

was the opportunity to meet with the President of Ukraine to ask him questions about the dissolution of the CEC in 2019, where she was a member.

In accordance with the cl.1.3.3. of the Methodology, impartiality shall mean absence of negative or positive subjective opinion, attitude towards someone or something which have been formed in advance, ability to take impartial, fair, objective decisions regardless of any sympathies, antipathies, public opinion.

In this regard, having studied the answers of the candidate provided on the EC's request, having analysed the documents, Ethics Council has reasonable doubts about the compliance with such indicators of the criteria of professional ethics and integrity as honesty (cl. 1.3.2 of the Methodology), and impartiality (cl. 1.3.3 of the Methodology).

In view of the abovementioned reasonable doubts, considered both cumulatively and separately, being governed by Rules 2.3, 3.1, 3.2, 3.16.2 of the Ethics Council's Rules of Procedure, Methodology, Article 91 of the Law of Ukraine "On the High Council of Justice", Final and Transitional Provisions of the Law of Ukraine "On Introducing Amendments into Some Legislative Bills of Ukraine Regarding the Procedure of Election (Appointment) to Positions of Members of the High Council of Justice and Activities of Disciplinary Inspectors of the High Council of Justice", the Ethics Council

has decided:

to recognize candidate for the position of the member of the High Council of Justice Svitlana Mykolaivna Kustova as non-compliant with the professional ethics and integrity criteria for filling in the position of the member of the High Council of Justice.

Chair

(signed)

Lev Kyshakevych