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ETHICS COUNCIL

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Kyiv

DECISION

No. 64

***On non-compliance of candidate
for the position of the member of the High Council of Justice
Kateryna Hryhorivna Plakhotniuk
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 Kateryna Hryhorivna Plakhotniuk 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 of Kateryna Hryhorivna Plakhotniuk for participation in the competition for the position of the member of the High Council of Justice as nominated by the Congress of Judges of Ukraine and admitted her to the interview with its Decision No. 33 of 21.07.2022.

Kateryna Hryhorivna Plakhotniuk was appointed to the position of Holosiyivskyi District Court of Kyiv with Decree No. 1001/2002 of the President of Ukraine of 11.11.2002 which she has held till now.

Having studied documents provided by Kateryna Hryhorivna Plakhotniuk for participating in the competition, her written explanations and documents provided by her 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. With respect to satisfaction of the motion on arrest of the charter capital of the limited liability company

On 25.10.2019 the candidate considered a motion of the representative of Public Joint-Stock Company “Ukrainian Innovation Company” (“PJSC”) as a civil claimant under a criminal proceeding and adopted a ruling on arrest of 100 % of the charter capital of LLC “Luhanpostach” (“LLC”) under case No. 752/22119/19. As stated in the ruling, representatives of the LLC were not summoned to a court hearing in order to prevent concealment and sale of property.

On 29.11.2019 Kyiv Court of Appeal overturned the ruling on imposition of arrest of 25.10.2019, since neither as of the moment of adoption of that ruling, nor during its appellate challenging the PJSC did not have the status of a civil claimant under a criminal proceeding, which is why it did not have a right to submit a motion on imposition of arrest. In fact, the motion itself is a form of claim petition submitted following the procedure of civil proceedings. The court also established that as of 25.10.2019 none of the LLC’s officials was a suspect, defendant, convict. The proceeding materials contain no information that the criminal proceeding concerned the LLC. In view of this, imposition of arrest on 100 % of the LLC’s charter capital is not legal and justified since it contradicts Article 171 of the Criminal Procedure Code of Ukraine (“CPC”).

On 21.01.2020 the High Council of Justice received a disciplinary complaint against the candidate’s actions in connection with adoption of the ruling of 25.10.2019.

With its decision of 15.07.2020 the Third Disciplinary Chamber of the High Council of Justice brought the candidate to disciplinary responsibility and applied a sanction in form of a warning to her.

The Third Disciplinary Chamber reached a conclusion that while adopting the ruling of 25.10.2019 the candidate committed a range of significant procedural violations, in particular:

- reasoning part of the ruling does not include the court's conclusions about existence of a justified suspicion regarding committing of a crime; a legal ground for the property arrest; possible amount of damages inflicted by the crime; consequences of the property arrest for third parties; reasonability and proportionality of restriction of the right of ownership with respect to the objectives of the criminal proceeding as required by the law;

- owner of the property was not summoned to the court hearing, while the copy of the ruling adopted pursuant to results of the motion consideration was not sent to the property owner in a timely manner, which resulted in violation of the LLC's rights for representation and protection of its interests. Failure to notify the property owner about the court hearing was important as it shows that the owner was deprived of an opportunity to present arguments in favor of its position and violation of the principle of equality of the parties.

The Third Disciplinary Chamber also reached a conclusion that in the process of the disciplinary case consideration there were found no circumstances which could show that the violations were intentional; at the same time, the nature of the committed violations showed that they were a result of negligence. Circumstances established by the check give sufficient grounds to believe that they were committed because of ineffective and non-diligent fulfillment of procedural authorities by the candidate, her failure to take proper and efficient measures to ensure proper consideration of the case in compliance with the parties' procedural rights.

During the interview and in her written explanations the candidate admitted that she made a mistake and explained it with excessive workload. The candidate pointed out that she made necessary conclusions and did not commit similar violations anymore.

Taking into consideration the candidate's explanations, the Ethics Council agrees with conclusions of the High Council of Justice that the candidate committed violations while adopting the ruling of 25.10.2019 as a result of negligence.

According to Article 7 of the Code of Judicial Ethics, a judge shall discharge the duties entrusted to him/her diligently and impartially.

The Bangalore Principles of Judicial Conduct set out that impartiality of the judge is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. According to cl. 6.5 of the Bangalore Principles, a judge shall perform all judicial duties efficiently, fairly and with reasonable promptness.

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

Thus, since the candidate committed significant procedural violations as a result of negligence while adopting the ruling of 25.10.2019 under case No. 752/22119/19, the Ethics Council has reasonable doubts about her compliance with such indicator of the professional ethics and integrity criteria as diligence (cl. 1.3.4.1 of the Methodology).

2. With respect to correction of a typo in the court decision

On 22.02.2022 the candidate as an investigative judge of Holosiyivskyi District Court of Kyiv satisfied a motion of the investigator under case No. 752/30516/21 (proceeding No. 1-ks/752/216/22) and adopted a ruling on imposition of arrest on property. The descriptive and reasoning parts of the ruling contain the list of seized property (hereinafter - "List 1"). At the same time, the

candidate specified a different list of property (hereinafte - “List 2”) in the resolution part of this ruling.

On 20.06.2022 the candidate adopted a ruling on correction of a typo which substituted List 2 with List 1 in the resolution part of the ruling on imposition of arrest of 22.02.2022.

In response to the Ethics Council’s question about adoption of the ruling on correction of a typo, the candidate explained that she specified List 1 instead of List 2 by mistake in the resolution part of the ruling. She found that when she was preparing the case materials for transfer to the court of appeal. Since this mistake was technical, she corrected her typo upon her own initiative with a respective ruling. The candidate believes that such ruling did not change the essence of the decision.

At the same time, even though Article 379(2) of the CPC sets out that the issue on correction of typos is resolved by the court during a court hearing, about the date, time, and venue of which it shall notify participants to the proceeding, the candidate did not notify the participants about such hearing. She explained it with the fact that she did not want to violate terms of consideration of the appellate petition concerning the ruling of 22.02.2022, which is why she decided to notify the participants about the hearing. Besides, according to her, a problem for proper notification also concerned the absence of funding for correspondence. In her opinion, correction of a typo without summoning of the proceeding participants to the court hearing did not violate their legal rights and interests, in particular, those of the owner of temporarily seized property.

The Ethics Council critically perceives explanations of the candidate as she violated requirements of Article 379 of the CPC with her actions.

According to Article 379(1) of the CPC, the court has the right to correct typos made in the court decision of this court upon its own initiative.

The Ethics Council takes into consideration the legal position of the Supreme Court expressed in the ruling of the Cassation Criminal Court of

22.07.2021 under case No. 234/8904/20, according to which correction of typos made in the court decision is allowed if it does not concern a change of the essence of court decisions. The Ethics Council also takes into consideration the legal position of the Grand Chamber of the Supreme Court from the ruling of 09.06.2022 under proceeding No. 11–84sap21, according to which a typo is a mechanical (unintentional, accidental) grammatical error made in the decision which may distort the text of the court decision or result in its incorrect comprehension. While resolving the issue on correction of typos or arithmetic errors made in the court decision, the court may not change the essence of its decision, it only eliminates inaccuracies which influence the opportunity of implementation of the court decision or its lawfulness.

The essence of the ruling on imposition of arrest on property consists in determining the list of property and court order regarding imposition of arrest on this property. The Ethics Council believes that the candidate changed the essence of the decision by changing the list of property in the resolution part of the ruling on imposition of arrest of 22.02.2022, thereby exceeding her authorities.

According to Article 379(2) of the CPC, participants to the court proceeding shall be notified about the date, time, and venue of the court hearing.

In her answers the candidate confirmed that she did not notify participants to the proceeding about the court hearing during which she planned to consider the issue on correction of the typo in the ruling of 22.02.2022. Thus, the candidate agreed that she did not comply with requirements of Article 379(2) of the CPC while adopting the ruling of 20.06.2022. The Ethics Council critically perceives the candidate's explanations that she did not summon the parties as she did not want to violate terms for consideration of the appellate petition. Introduction of corrections to the court decision is the right of the court and not its obligation, while consideration of the appellate petition is not a ground for derogation from requirements of Article 379(2) of the CPC. The candidate's explanation about lack of funding in the court for correspondence is equally unconvincing as the

candidate did not plan at all to notify participants to the proceeding about the respective hearing given her explanations about the need to comply with terms for consideration of the appellate petition.

The Ethics Council also takes into account that since the candidate specified property from List 2 in the resolution part of the ruling of 22.02.2022, arrest was considered as imposed on this particular property. Before the date of adoption of the ruling on correction of a typo of 20.06.2022 property from List 1 still had the status of the temporarily seized one. Hence, contrary to requirements of the CPC, once the candidate considered the investigator's motion on imposition of arrest on property from List 1, the legal status of this property did not change.

Since the candidate adopted the ruling of 20.06.2022 while preparing materials for transfer to the court of appeal, in almost 4 months after adoption of the ruling of 22.02.2022, the Ethics Council thinks that the candidate adopted the ruling on correction of the typo in order to avoid the court of appeal quashing the ruling on imposition of arrest due to the court error. At the same time, correction of the court error in the ruling of the first-instance court by means of amending the list of property on which arrest was imposed belongs to the authorities of the court of appeal. Having changed the list of property to be arrested, the candidate changed the essence of the decision, thereby exceeding her authorities.

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

Since the candidate violated requirements of Article 379 of the CPC while adopting the ruling on correction of a typo of 20.06.2022, the Ethics Council has reasonable doubts about her compliance with such indicator of the professional ethics and integrity criteria as diligence.

According to Article 126 of the Constitution of Ukraine, a judge may not be brought to responsibility for a court decision taken by him/her, except for committing of a crime or disciplinary offence.

According to Article 106(2) of the Law of Ukraine “On the Judiciary and Status of Judges”, overturning or changing of the court decision does not entail disciplinary responsibility of a judge who participated in its adoption, except for instances when the quashed or changed decision was adopted as a result of intentional breach of legal provisions or improper attitude towards official duties.

Cl. 71 of the judgment of the European Court of Human Rights (“ECHR”) under case “Gumenyuk and Others v. Ukraine” sets out that the Court must be particularly attentive to the protection of members of the judiciary against measures affecting their status or career that can threaten their judicial independence and autonomy.

At the same time, the Ethics Council takes into consideration the ECHR’s case law, according to which the ECHR refrains from review of the national court’s decision, except for instances when the mistake of the national court is so obvious that it may be qualified as an “evident error” (i.e. error that could not have been made by a reasonable court). If unjustified nature of the national court’s conclusion with respect to facts was “staggering and noticeable”, the ECHR may rule that the proceeding could be considered to be “gross arbitrariness”¹ (judgment under case “Khamidov v. Russia”).

The principle of judicial independence is limited, in particular, to the judge’s obligation to ensure the person’s right for fair trial. In case the judge makes “an evident error” (error that could not have been made by a reasonable court) while taking a court decision, the right to fair trial may not be ensured. In the Ethics Council’s opinion, the candidate’s rulings of 25.10.2019 under case

¹ https://supreme.court.gov.ua/userfiles/media/oglyad_prakt_kgs_1.pdf

No. 752/22119/19 and of 20.06.2022 under case No. 752/30516/21 have signs of “an evident error” in the meaning of the ECHR’s case law.

Thus, the Ethics Council has reasonable doubts about the candidate’s compliance with such indicator of the professional ethics and integrity criteria as diligence (cl. 1.3.4.1 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 Kateryna Hryhorivna Plakhotniuk 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