



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

12 January 2022

Kyiv

DECISION

No. 1

***On refusal in admission of the
candidate for the position of the High
Council of Justice to the interview***

Having considered the issue on admission or refusal in admission of candidates for the position of the member of the High Council of Justice to the interview in line with the Law of Ukraine “On the High Council of Justice”, Rules of Procedure of the Ethics Council adopted by Decision No. 4 of the Ethics Council as of 9 December 2021, Methodology for evaluation of compliance of the candidate for the position of the member of the High Council of Justice and members of the High Council of Justice with the criteria of professional ethics and integrity adopted by Decision No. 5 of the Ethics Council as of 9 December 2021, the Ethics Council consisting of Chair of the Ethics Council Lev Kyshakevych, Deputy Chair of the Ethics Council Sir Anthony Hooper, members of the Council: Yurii Triasun, Volodymyr Siverin, Robert Cordy (in the videoconference mode), Lavly Perling (in the videoconference mode)

h a s e s t a b l i s h e d:

in line with para. 1 of Article 9¹(14) of the Law of Ukraine “On the High Council of Justice”, the Ethics Council carries out selection of candidates pursuant to consideration of documents submitted by candidates, results of the special check, and respective information from open sources.

In line with cl. 1–3 of Rule 3.7.2 of the Ethics Council’s Rules of Procedure, to make the selection of candidates:

1) within no more than fourteen calendar days of their appointment, the rapporteurs shall study documents submitted by candidates, results of the special check, and respective information from open sources;

2) based on the results of consideration of a draft opinion the Council shall decide on admission or refusal in admission of the candidate to the interview;

3) in case of adopting a decision on refusal in admission of the candidate to the interview, such decision shall contain justification of refusal.

On 30 November 2021 with letter No. 28598/0/9-21 the Ethics Council received from the Secretariat of the High Council of Justice copies of documents submitted by Oleksandr Yuriiovych Boiko for participation in the competition for the position of the member of the High Council of Justice to be selected by the Congress of Judges of Ukraine.

O. Yu. Boiko was appointed to the position of the judge of Ordzhonikidze District Court of Zaporizhzhia for the term of five years by Decree No. 484/2012 of the President of Ukraine as of 23 August 2012. Authorities relating to administration of justice have been suspended due to the expiration of the five-year term of appointment to the judicial office.

The Law of Ukraine “On the Judiciary and Status of Judges” (hereinafter referred to as the Law) obliges the judge to diligently follow judicial ethics rules, including demonstration and compliance with high standards of conduct in any activities with a view to strengthening public trust in court, ensuring trust of the society in honesty and incorruptibility of judges (para. 2 of Article 56(7) of the Law).

The Code of Judicial Ethics adopted by the XI Congress of Judges of Ukraine on 22 February 2013 (hereinafter referred to as the Code) stipulates that judges voluntarily commit themselves to substantial limitations as to the conformity with the rules of ethics both while rendering justice and off the bench (para. 2 of the Preamble to the Code). A judge shall be an example of diligent compliance with high standards of conduct with a view to strengthening citizens’ trust in honesty, independence, impartiality, and fairness of the court (Article 1 of the Code). A judge shall make every effort for his/her conduct to appear impeccable to a reasonable, law-abiding, and well-informed person (Article 3 of the Code).

In its Opinion No. 3 (2002) on the principles and rules governing judges’ professional conduct, in particular, ethics, incompatible behavior and impartiality, the Consultative Council of European Judges points out that judges shall not only professionally fulfill their duties, but also conduct themselves in a respectable way in their private life. Judges’ conduct is the prerequisite of trust in the judiciary.

While O. Yu. Boiko was holding the judicial office, there were initiated disciplinary proceedings against him, pursuant to results of consideration of which there were established facts that he violated requirements of the procedural law. As a result of that a disciplinary sanction in the form of temporary suspension from administration of justice was applied to him.

On 21 February 2018, with its decision No. 579/3ДП/15-18 the Third Disciplinary Chamber of the HCJ decided to bring O. Yu. Boiko to disciplinary responsibility because of a significant violation of procedural law provisions, which resulted in actual deprivation of an opportunity to bring suspected persons to criminal responsibility. In connection with this the Third Disciplinary Chamber of the HCJ

decided to apply to him a disciplinary sanction in the form of a recommendation to suspend him from administration of justice for six months along with depriving of the right to receive additional bonuses to the judge's basic salary, referring him to the National School of Judges of Ukraine to participate in the advanced training for investigative judges with subsequent qualification evaluation in order to confirm the judge's capacity to administer justice in the respective court. On 26 June 2018, the High Council of Justice adopted decision No. 2056/0/15-18 which applied the afore indicated disciplinary sanction to O. Yu. Boiko.

On 11 September 2019, with its decision under case No. 9901/742/18 the Supreme Court denied in satisfying O. Yu. Boiko's claim on quashing decision of the HCJ No. 2056/0/15-18. The Supreme Court rejected all claimant's arguments, referring to the Bangalore Principles of Judicial Conduct as of 19 May 2006 adopted by Resolution No. 2006/23 of the UN Economic and Social Council as of 27 July 2006, which mention the judge's obligation to be an example of diligent compliance with requirements of the law, rule of law, judicial oath, high standards of conduct with a view to strengthening the citizens' trust in honesty, independence, impartiality, and fairness of the court. The Supreme Court's decision as of 11 September 2019 was supported with the ruling of the Grand Chamber of the Supreme Court as of 16 April 2020.

On 19 November 2018, the Second Disciplinary Chamber of the HCJ considered one more disciplinary complaint against actions of judge O. Yu. Boiko who unlawfully quashed the prosecutor's ruling on denial in satisfying a motion on closure of the criminal proceeding submitted by a person suspected of committing an offence. Regardless of the fact that the Second Disciplinary Chamber considered actions of O. Yu. Boiko as a disciplinary offence, this time disciplinary responsibility measures were not applied to him as the previously imposed disciplinary sanction of the HCJ with respect to him was still valid at the time.

The Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly Resolutions 40/32 and 40/146 as of 29 November and 13 December 1985 (hereinafter referred to as the Principles) set out that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressure, threats or interferences, direct or indirect, from any quarter or for any reason (cl. 2 of the Principles). Judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary (cl. 8 of the Principles).

In its Recommendation No. R (94) 12 on the Independence, Efficiency and Roles of Judges, the Committee of Ministers of the Council of Europe pointed out that judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law (Principle I.2 d of Recommendation No. R (94) 12).

The Universal Charter of the Judge adopted by the Central Council of the International Association of Judges in Taipei on 17 November 1999 (hereinafter referred to as the Charter) obliges judges to be subject only to the law and consider only the law in the performance of the judicial duties (Article 3 of the Charter).

The European Charter on the Statute for Judges adopted by representatives of European countries and participants of the meeting of two international association of judges in Strasbourg on 8–10 July 1998, supported at the meeting of Presidents of Supreme Courts of Central and Eastern European countries in Kyiv on 12–14 October 1998, as well as by judges and representatives of ministries of justice from 25 European countries during the meeting in Lisbon on 8–10 April 1999 (hereinafter referred to as the European Charter) stipulates that judges must show, in discharging their duties, respect for individuals and vigilance in maintaining the high level of competence which the decision of cases requires on every occasion – decisions on which depend the guarantee of individual rights (cl. 1.5. of Chapter I of the European Charter).

A judge shall render justice within the limits and according to the procedure established by procedural law, as well as take actions to improve his/her knowledge and practical skills, which is directly evident from provisions of Articles 7–8 of the Code.

According to cl. 1.3.4.1 of the Methodology for evaluation of compliance of the candidate for the position of the member of the High Council of Justice and members of the High Council of Justice with the criteria of professional ethics and integrity (hereinafter referred to as the Methodology), a candidate fails to comply with the indicators of independence, honesty, impartiality, diligence, in particular, in case when 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 independence, honesty, impartiality, diligence.

Cl. 1.3.6.1 of the Methodology stipulates that a candidate fails to comply with the indicator of compliance with ethical norms in case there are reasonable doubts that such candidate in the present or any past professional capacity has acted in line with the rules of professional ethics and other ethical norms.

In view of the above, the Ethics Council has reached a conclusion that while intentionally adopting decisions contrary to requirements of the procedural law O. Yu. Boiko acted in contradiction with requirements of the legislation and rules of professional ethics regarding diligence. In view of this, the Ethics Council is of the opinion that there are reasonable doubts about O. Yu. Boiko's compliance with such indicators of the professional ethics and integrity criteria as diligence (cl. 1.3.4.1 of the Methodology) and compliance with ethical norms (cl. 1.3.6.1 of the Methodology).

According to the video recording that is freely available following the link <https://www.youtube.com/watch?v=tLfZkjpOJpU>, on 6 February 2017 in the court room of Ordzhonikidze District Court of Zaporizhzhia judge O. Yu. Boiko intentionally, groundlessly applied physical violence to a person present in the court room.

The Charter considers judges' independence to be an important and integral prerequisite for impartial judiciary. While fulfilling his/her authorities a judge shall be impartial, i.e. perform his/her duties with dignity, respect for court and all persons participating in the process (Article 5(2) of the Charter).

The Bangalore Principles of Judicial Conduct as of 19 May 2006 endorsed by Resolution No. 2006/23 of the UN Economic and Social Council as of 27 July 2006 oblige the judge to follow ethical norms, be free from any tendencies, biases, or superstitions, refrain from manifestations of incorrect behavior while performing activities related to the office. Both in the judicial process and off bench judge's actions and decisions shall support the existing level and contribute to an increase in the trust of the society, representatives of the legal profession, and case participants in his/her objectivity. It is important that every member of the judiciary always restricts oneself in performing actions that may become a ground for depriving him/her of the right to participate in the court hearing and adopt decisions under the case, in particular, demonstrate verbally or by conduct preferences or partiality in attitude towards any person or group of persons, being governed by reasons that are not related to the case. During court hearings a judge shall maintain order and follow decorum rules, behave with patience, dignity, and politeness with respect to case participants, jurors, witnesses, attorneys, and other persons with whom he/she communications in his/her professional capacity.

The Code stipulates the judge's obligation to render justice within the limits and according to the procedure established by procedural law, while demonstrating tact, politeness, moderation, and respect for participants of the judicial process and other persons, as well as make every effort for his/her conduct to appear impeccable to a reasonable, law-abiding, and well-informed person (Articles 3, 8 of the Code).

Cl. 1.3.6.1 of the Ethics Council's Methodology stipulates that a candidate fails to comply with the indicator of compliance with ethical norms in case there are reasonable doubts that such candidate in the present or any past professional capacity has acted in line with the rules of professional ethics and other ethical norms.

Pursuant to cl. 1.3.6.2 of the Methodology, a candidate fails to comply with the indicator of impeccable behavior in professional activities and personal life in case he has committed any actions or undertakes a lifestyle that makes him unworthy of being a member of the High Council of Justice, undermines authority of the judiciary, or raises reasonable doubts that such candidate will comply with ethical standards, including refraining from any manifestations of discrimination.

In view of the above, the Ethics Council has reached a conclusion that by intentionally, groundlessly applying physical violence to a person present in the court room O. Yu. Boiko acted contrary to requirements of rules of professional ethics and committed actions that harm the authority of the judiciary. In view of this, the Ethics Council is of the opinion that there are reasonable doubts about O. Yu. Boiko's compliance with such indicators of the professional ethics and integrity criteria as compliance with ethical norms (cl. 1.3.6.1 of the Methodology) and immaculate conduct in professional activities and personal life (cl. 1.3.6.2 of the Methodology).

On 25 November 2021, at his personal page in Facebook O. Yu. Boiko published a post with the use of obscene and insulting expressions. The text of this post is available following the link: https://www.facebook.com/permalink.php?story_fbid=1083376265758087&id=100022571701984.

According to the Bangalore Principles of Judicial Conduct as of 19 May 2006 endorsed by Resolution No. 2006/23 of the UN Economic and Social Council as of 27 July 2006, a judge, like any other citizen, is entitled to freedom of expression, but, in exercising such rights, a judge shall always remember about the need to maintain the high status of the judicial office.

The Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly Resolutions 40/32 and 40/146 as of 29 November and 13 December 1985 require that judges exercise their right for freedom of expression in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary (cl. 8 of the Principles).

The obligation of the judge to refrain from any behavior, action or expression of a kind effectively to affect confidence in their impartiality and their independence is directly evident from provisions of cl. 4.3 of the European Charter on the Statute for Judges.

According to the ECHR, everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of these freedoms may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in particular, for the protection of the reputation or rights of others, for maintaining the authority and impartiality of the judiciary (Article 10 of the ECHR). A judge shall demonstrate decorum while exercising freedom of expression when the authority and impartiality of justice may be subject to doubts (decision of the ECtHR under case: "*Wille v. Liechtenstein*", No. 28396/95, § 64, 28 October 1999). He/she shall be loyal, reserved, and careful (decision of the ECtHR under case: "*Kudeshkina v. Russian Federation*", No. 29492/05, §§ 85-86, 26 February 2009).

The Code stipulates that it is acceptable for a judge to have a social network account, use Internet-forums and other forms of online communication, however, a judge may post and comment only on information which does not undermine the authority of a judge and the judiciary (Article 20 of the Code).

Cl. 1.3.6.1 of the Ethics Council's Methodology stipulates that a candidate fails to comply with the indicator of compliance with ethical norms in case there are reasonable doubts that such candidate in the present or any past professional capacity has acted in line with the rules of professional ethics and other ethical norms.

Pursuant to cl. 1.3.6.2 of the Methodology, a candidate fails to comply with the indicator of impeccable behavior in professional activities and personal life in case he has committed any actions or undertakes a lifestyle that makes him unworthy of being a member of the High Council of Justice, undermines authority of the judiciary, or raises reasonable doubts that such candidate will comply with ethical standards, including refraining from any manifestations of discrimination.

In view of the above, the Ethics Council has reached a conclusion that by publicly using obscene and insulting expressions O. Yu. Boiko acted contrary to rules of professional ethics and committed actions that harm the authority of the judiciary. In view of this, the Ethics Council is of the opinion that there are reasonable doubts about O. Yu. Boiko's compliance with such indicators of the professional ethics and integrity criteria as compliance with ethical norms (cl. 1.3.6.1 of the Methodology) and immaculate conduct in professional activities and personal life (cl. 1.3.6.2 of the Methodology).

The Council's Rules of Procedure set out that a candidate to the position of the HCJ member fails to comply with the professional ethics and integrity criteria in case non-compliance is proved or there are reasonable doubts about compliance (Rule 3.3. of the Council's Rules of Procedure). Pursuant to results of analyzing materials set out by para. 1 of Article 9¹(14) of the Law of Ukraine "On the High Council of Justice", the Ethics Council has reached a conclusion that such actions of O. Yu. Boiko raise reasonable doubts about his compliance with the indicators of diligence, compliance with professional ethics and immaculate conduct in professional activities. In view of this, candidate for the position of the HCJ member O. Yu. Boiko does not comply with the professional ethics and integrity criteria, which is why he may not be admitted to the interview.

Thus, being governed by Rules 3.7.1, 3.7.2 of the Ethics Council's Rules of Procedure, Methodology for evaluation of compliance of the candidate for the position of the member of the High Council of Justice and members of the High Council of Justice with the criteria of professional ethics and integrity, Article 9(7), Article 9¹ of the Law of Ukraine "On the High Council of Justice", the Ethics Council

h a s d e c i d e d:

to refuse to candidate to the position of the member of the High Council of Justice
Oleksandr Yuriiovych Boiko in admission to the interview.

Chair

(signature)

Lev Kyshakevych