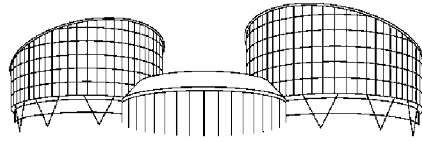

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF BURMYCH AND OTHERS v. UKRAINE

(Applications nos. 46852/13 et al.*)*

JUDGMENT
(Striking out)

This version was rectified on 1 December 2017 under Rule 81 of the Rules of Court.

STRASBOURG

12 October 2017

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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F47.1.1

JOINT DISSENTING OPINION OF JUDGES YUDKIVSKA, SAJÓ, BIANKU, KARAKAŞ, DE GAETANO, LAFFRANQUE AND MOTOC

1. The present judgment has nothing to do with the legal interpretation of human rights. It concerns a matter of judicial policy only, and as such completely changes the well-established paradigm of the Convention system. Of course the European Court of Human Rights is supposed to concentrate on the most serious human rights violations and landmark decisions on European values. However, the Court cannot, on account of a heavy caseload, just cease to perform its judicial tasks, leave the applicants in an unpredictable position and transfer the judicial responsibility on to a political body which unfortunately has so far had little impact on helping the respondent Government to properly execute the pilot judgment and to enact general measures. The Court itself has repeatedly emphasised that the Convention rights need to be practical and effective and that a fair trial does not end with a judgment, but that the judgment also needs to be properly executed. The Court should take seriously the fact that this principle applies not only to national judgments but also to its own judgments. Every applicant to this Court has to be taken seriously and cannot be considered as a "burden".

2. To our regret, we disagree with the majority as to the conclusion and to the reasoning, for several reasons.

(i) As a matter of judicial responsibility

3. First of all, we strongly disagree with the first point of the operative part of the judgment. The majority decides to join the applications in the present case and the 12,143 applications listed in Appendices I and II to this judgment. It does not appear from the proceedings that any of the other 12,143 cases has been the subject of a judicial determination as to the facts or legal qualification of the claims advanced by the applicants in those cases. The formation of the Grand Chamber which considered the present case does not know the facts of any of those 12,143 applications. Moreover, only a few of those cases have been communicated to the respondent Government, which is now in a position to tell the Court whether the applicants in the cases in question are still victims of the violations of which they complained. Therefore, we feel ill-equipped to decide on the presumption that they are similar to the five applications nos. 46852/13, 47786/13, 54125/13, 56605/13 and 3653/14, having been unable to assess each of the cases individually. We consequently consider it inappropriate to decide to join them to the applications in *Burmych, Yaremchuk, Varava, Neborachko* and *Izolyatsiya, PAT*.

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repetition of similar judgments (see paragraph 174). Nevertheless, considering the possibility of restoring these applications to the list of cases under Article 37 § 2, the majority envisages "that it may be appropriate to reassess the situation within two years of the delivery of the present judgment" (see paragraph 223). But what can be gained by transferring all these cases to the Committee of Ministers for two years and then, most probably, taking them back? This will only postpone the so-called burden of the Court rather than relieving it. Again, we consider that no applicant can ever be seen as a burden to a Court which is duty-bound to hear and determine individual applications. Against the background of sixteen years of fruitless efforts to find a tangible solution to the structural problem at issue, it would not appear realistic to think that such a solution can be found within the said two years. This administrative transfer will also place a burden on the Court's resources comparable to that relating to the examination of repetitive cases.

38. If this judgment is to be understood as an attempt to encourage the competent Ukrainian authorities to step up their efforts to solve the problem, this is being done at the expense and to the detriment of 12,143 applicants who had applied to this Court to restore their breached rights.

(v) Conclusion

39. To our regret, we must emphasise that although lowering the number of cases pending before the Court might make the administrative situation of the institution look brighter, this does not mean that the human rights situation in Europe is any better. *Au contraire*! The Court was set up specifically to respond to these violations as an independent judicial body, and not to concentrate on statistics. The judicial duty to decide individual cases should be expressed with more force when the situation of the rule of law and execution of thousands of final judgments in a member country, namely Ukraine, is so problematic. By failing to address this issue the Court is shooting itself in the foot – the rule of law in member States. Nor could a failure to deal with these fundamental rights cases be classified under judicial economy, judicial efficiency, or the Brighton philosophy. This is simply momentary judicial convenience.

40. When this Court adopted its first pilot judgment in the famous *Broniowski* case cited above, our former colleague Judge Zupancić, concurring with the Grand Chamber, mentioned that the novel approach undertaken by it "has nothing to do with the Court's caseload. It has, however, everything to do with justice." In the present case, unfortunately, the reverse holds.

41. This judgment is without legal basis in the Convention, it throws thousands of desperate people into a legal limbo and undermines the protection of human rights of the Convention - we most emphatically dissent.