The Role of the European Court of Human Rights in Ensuring the Right to a Fair Trial in Ukraine

Роль практики ЄСПЛ в забезпеченні права на справедливий суд в Україні

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право на справедливий суд, верховенство права, права людини, імплементація міжнародно-правових норм, практика Європейського суду з прав людини.

Key words:

right to fair trial, supremacy of law, human rights, implementation of international legal norms, practice of European Court of Human Rights.

After the ratification of the European Convention on Human Rights and Fundamental Freedoms (hereinafter, the Convention) Ukraine undertook to organize its legal system so that the real guarantee of the right to a fair trial as set out in the Convention is provided. Pursuant to the specified international commitments, the Ukrainian Parliament adopted the Law of Ukraine "On Amendments to the Constitution of Ukraine (on Justice)" dated June 2, 2016[1] (which became effective on September 30, 2016), providing for a number of changes aimed at practical implementation of the rule of law and ensuring everyone's right to a fair trial by an independent and impartial tribunal. It is this state formation process that has determined the relevance of study of the specified research issues.

The research of many scientists is dedicated to various aspects of the essence as well as problems related to the provision of the right to a fair trial, including M. Buromenskyi, V. Butkevich, D. Vitkauskas, V. Horodovenko, G. Dikov, V. Camp, O. Lemak, P. Rabinovych, M. Savchyn, V. Stefaniuk, O. Tkachuk, S. Shevchuk and others. These scientists have made a significant contribution to the development of the theoretical aspects of the issue under study, while the modern understanding of the right to a fair trial guaranteed by Article 6 of the Convention and the impact of the practice of the European Court of Human Rights (hereinafter, the Court) on the implementation of this law in Ukraine and the related problems have been insufficiently studied.

The purpose of this article is to reveal the nature and to define the basic structural elements of a fair trial; to analyze the current understanding of the right to a fair trial in the practice of the Court; to determine the status of the practice of the European Court of Human Rights in the system of law sources in Ukraine; to establish the conceptual foundations of the improvement of the process of implementation of the Court's practice on the application of Article 6 of the Convention in the national legal system and the direct impact thereof on the right to a fair trial in Ukraine.

The theory of law understands the practice of the European Court of Human Rights in legal theory as legal opinions on the interpretation of the Convention on Human Rights and Fundamental Freedoms formulated and stated by the Court in its decisions, which are of regulatory nature and which together with the Convention are recognized binding on the member states of the Council of Europe.

When characterizing the judgments of the European Court of Human Rights, the theory of law often uses the term "case law" but it requires some clarification, given that the context of the practice of the Court usually does not understand "cases" as interpreted in the classic doctrine, i.e. the English law model of judicial precedent, but the so-called sui generis precedents (of a special kind) or those which by their nature are close to the precedents with due regard to their extraordinary authority. The European Court of Human Rights stressed the need for such precedents. Thus, in the judgment dated April 24, 1990 in the case of *Kruslin v. France*, the Court recognized the important role of the case law, which expands and develops the content of the rules of law, as the case law plays an important role in continental countries. In its practice, when considering applications, the

[1] On Amendments to the Constitution of Ukraine (on Justice): the law of Ukraine dated June 2, 2016. Retrieved from : http://zakon3.rada.gov.ua/laws/show/1401–19

Court refers to its own precedents (cases), and then is guided by them in what is being done in the interests of legal certainty and regular development of the case law in accordance with the Convention (see. judgment in the case of *Chapman v. the United Kingdom*).

The binding force of the practice of the European Court of Human Rights in Ukraine is legislatively based on the provisions of Article 1 of the Law of Ukraine "On Ratification of the European Convention on Human Rights and Fundamental Freedoms 1950 Protocol, Protocols № 2, 4, 7 and 11 of the Convention" dated July 17, 1997, according to which Ukraine fully recognizes as effective within its territory Article 46 of the European Convention on Human Rights and Fundamental Freedoms on recognizing the jurisdiction of the European Court of Human Rights to be binding and not requiring a special agreement in all matters concerning the interpretation and application of the Convention as well as Article 17 of the Law of Ukraine "On Enforcement of Judgments and Application of the Practice of the European Court of Human Rights" dated February 23, 2006, according to which, when considering cases, the courts apply the Convention and the practice of the Court as authority.

In order to develop these legal provisions, the Plenum of the High Specialized Court of Ukraine for Civil and Criminal Cases in its Resolution № 13 dated December 19, 2014 formulates the legal position in accordance with which international treaties of Ukraine, which have become effective, may, due to their priority over the norms of the relevant legislative acts of Ukraine, change the regulation of legal relations established by the law of Ukraine. Moreover, it is indicated that when considering a particular court case, the resolution (overcoming) of the conflict between the norm of the international treaty of Ukraine and the norm of another legislative act of Ukraine falls within the competence of the court (see Preamble to the above-mentioned Resolution of the Plenum). So, today Ukraine as a member state of the Council of Europe have all the grounds to apply the provisions of the Convention and the Court's practice by all jurisdictional authorities after its publication.

The obligations under the Convention require, among other things, from the Ukrainian state the practical implementation of the rule of law and ensuring everyone's right to a fair trial by an independent and impartial tribunal. Definition of the last category is contained in Article 6 of the Convention, which states that the right to a fair trial shall mean the individual's right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which will resolve a dispute over civil rights and obligations of a person or determine the justification of any criminal charge brought against an individual. Analysis of the design of Clause 1 of Article 6 of the Convention allows to conclude on the basic elements of the right to judicial protection, which should include: (a) the right to a trial; (b) fair trial; (c) public hearing and publicly pronounced judgments; (d) a reasonable period of consideration of the case; (e) independent and impartial tribunal; (e) consideration of the case by the tribunal established by law.

The right to a hearing, the main component of which is the right of access, means that the person should be provided with the possibility to go to court to resolve a particular issue, and that the state should impose legal or practical obstacles to the exercise of this right.

For the effective application of Article 6 of the Convention, the European Court of Human Rights, which has the exclusive right to interpret the Convention, has developed the following structural elements of "the right to a trial": access to justice; final nature of a judgment; timely execution of final judgments. The first component is understood as the ability of a person to freely receive judicial protection through access to an independent and impartial settlement of disputes in accordance with the established procedure on the basis of the rule of law. The legal literature identifies four main areas of concern regarding the right to access to justice: (a) the absence or lack of legal capacity of the applicant to file a civil action *(Golder v. the United Kingdom)* or appeal in a criminal case *(Papon v. France),* or for judgment *(Ganci v. Italy);* (b) procedural barriers to access such as limited terms *(Hadjianastassiou v. Greece)* and court fees *(Kreuz v. Poland);* (c) practical obstacles to access, such as lack of legal aid *(Airey v. Ireland);* (d) lack of jurisdiction over defendants in civil cases *(Osman v. UnitedKingdom)*[2].

Among the specified areas, the procedural and practical obstacles to access to justice deserve the most attention, since the latter is a manifestation of the right of states to impose restrictions on potential trial participants and, as a rule, depends to a lesser extent on the will of the participants themselves.

One such example of procedural obstacles in accessing justice is contained in the Administrative Procedure Code of Ukraine (hereinafter, the APC of Ukraine), under the provisions of which the plaintiff cannot be allowed

[2] 2 Виткаускас Д. Защита права на справедливое судебное разбирательство в рамках Европейской конвенции о защите прав человека. Серия пособий Совета Европы / Д. Виткаускас, Г. Диков. – Воронеж : «Элист», 2014. – 39–40.

to judicial review if the court does not find grounds in the case files (actually, in the files of the statement of claim) for declaring the reasons for missed deadlines to apply to court justifiable and it is allowed without a trial.

At the same time, it seems obvious that the practice of dismissing the claim by the judge due to a default to timely apply to court going without a court hearing and finding the reasons for missed deadlines under Article 100 of Administrative Procedure Code of Ukraine is unacceptable, in conflict with the applicable procedural laws and principles of administrative proceedings. As correctly stated by M. Smokovich, even if assuming that on these issues procedural norms are ambiguous in the interpreting and involves the conflict of law, then in accordance with the practice of the European Court of Human Rights in such cases the law must be interpreted in the best interests of the plaintiff[3].

In particular, the judgment in *Ilhan v. Turkey* states that the rule of setting limits for access to the court due to missed deadlines should be applied with some flexibility and without extreme formalism; it does not apply automatically and is not absolute; when checking its implementation attention should be paid to the circumstances of the case. In addition, in the case of *Bellet v. France the Court* noted that Clause 1of Article 6 of § 1 of the Convention contains guarantees of fair trial, one aspect of which is access to court. The level of access provided by national law must be sufficient to ensure the right of a person to a court in the light of the rule of law in a democratic society. In order to make access effective, a person must have a clear practical opportunity to challenge actions that constitute interference with his or her rights. Missed deadlines to apply to the administrative court cannot be absolute grounds for dismissal of a claim, as the court may declare the cause of missed deadlines reasonable and then the case is considered and solved in the manner prescribed by the Administrative Procedure Code of Ukraine. Therefore, there are every reason to conclude that the dismissal of the statement of claim under the rules of Article 100 of the Administrative Procedure Code of Ukraine of Ukraine without holding a court hearing constitutes a clear violation of the right to access to justice and evidence of inadequate judicial protection.

It should also be noted that the Court in its decisions, when interpreting the provisions of the Convention, stated that the right to access to justice was not absolute and could be limited[4]: States have the right to set limits on potential participants in trials, but these restrictions must pursue a legitimate aim, be commensurate and not so large to distort the very essence of the law *(see. Stanev v. Bulgaria; Ashingdane v. the United Kingdom)*.

With regard to such component of the "right to a trial" as a final judgment, it should be noted that this element of the above right means that as soon as a judgment in a civil case or an acquittal in a criminal case becomes final, they will immediately become effective without any risk of their cancellation *(Brumarescu v. Romania)*. This right stems from the principle of legal certainty, under which persons should be able to plan their actions with confidence that they are aware of the legal consequences of their actions.

Timely execution of the final judgment is not a less important part of the right to a fair trial, guaranteed by Art. 6 of the Convention is timely execution of a final judgment. Thus, the European Court of Human Rights in its judgment in the case of *Hornsby v. Greece* stated that the right to a fair trial would be illusory if the domestic legal system of the Contracting State allowed failure to execute the final and binding judgment to the detriment of one party. The binding nature of judgments, along with other elements of a fair trial, in particular, such as access to justice, subjective impartiality of the court, the principle of legal certainty, the prohibition of interference of the legislator in the administration of justice are considered by the Court to be the elements of the rule of law *(Golder v. The United Kingdom,* app. no. 4 451/70).

The next element of the right under study is the fairness of a trial, which, in the sense of Article 6 of the Convention, concerns a trial in general and largely depends on whether the applicants are given sufficient opportunity to express their position on the case and to rebut evidence which they consider wrong, not matter whether decisions of national courts are right or wrong *(Karaleviius v. Lithuania,* app. no. 53 254/99).

As T. A. Tkachuk expediently notes, the Court has developed a dual approach to the understanding of justice in the context of Clause 1 of Article 6 of the Convention. Thus, in a broad sense, this notion includes all the elements provided for in Clause 1 of Article 6 of the Convention; in the narrower sense, it applies only to

[3] 3 Смокович М. Строк звернення до суду в адміністративному судочинстві / М. Смокович // Часопис Національного університету «Острозька академія». Серія «Право». – 2011. – № 2 (4) [Електронний ресурс]. – Режим доступу : http://lj.oa.edu.ua/articles/2011/n2/11smivas.pdf.

[4] Guide to Article 6 of the Convention – Rights to a fair trial (civil rights) (2013). Strasbourg : Council of Europe and European Court of Human Rights. Retrieved from http://www.echr.coe.int/Documents / Guide_Art_6_ENG.pdf.

the requirement of "justice" that is used in the text of Article 6 of the Convention along with the procedural requirements of publicity and reasonableness of the time trial[5] . In particular, the narrow understanding of justice includes, in addition to the above, the following requirements such as competition, equality of the parties, personal presence, etc.

In turn, the requirement for the publicity of the trial is aimed at protecting the parties in civil proceedings as well as defendants in criminal proceedings from the administration of justice behind closed doors and ensuring greater transparency thereof in order to maintain the authority of the judiciary system in the eyes of the public. This right is not absolute, since Clause 1 of Article 6 of the Convention expressly mentions the exceptions for which the restriction of this right is permissible, while always proceeding from the presumption in favor of a public hearing, and the exceptions should be clearly stipulated by the circumstances of the case on the basis of strict verification of their necessity. The court is not required to declare the full text of the decision during a public meeting – publication in writing will be sufficient, while the text of the decision should be available in the office for review *(Pretto and Others v. Italy,* app. no. 7 984/77).

When interpreting Clause 1 of Article 6 of the Convention in respect of the reasonableness of the period for a trial, the Court has formulated a position according to which "in civil proceedings a reasonable time under Clause 1 of Article 6 usually starts to run from the moment when it has been commenced before the court; however, t in some cases the passage of time may start before *(Erkner and Hofauer v. Austria,* app. no. No. 9 616/81). At the same time, the "reasonable" time for both criminal and civil cases is determined depending on many circumstances. This Court usually excludes from this term the periods when delays in the consideration are initiated by an individual (the motions made by a private individual, reasons for replacement of counsel, causes of unmotivated absence of the parties to the litigation, etc. are studied). This time also excluded the period for examinations if they are carried out within a "reasonable" time.

Part 1 of Art. 6 of the Convention determines the consideration of the case by a tribunal established by law as one of the elements of the right to a fair trial. Thus, Thus, in accordance with the Court's case–law practice, the term "established by law" in Article 6 of the Convention seeks to ensure that "the judicial branch of power in a democratic society does not depend on the executive branch, but is governed by law adopted by the parliament" (see the judgment in the case of *Zand v. Austria*, app. no. 7 360/76).

The requirement of "tribunal established by law" is closely related to the notion of independence of court. The last category requires procedural defense mechanisms to separate the judiciary branch from the other branches, primarily the executive one *(Clarke v. the United Kingdom,* app. no. 23 695/02). The European Court of Human Rights in its practice has developed criteria for assessing independence. In particular, in determining whether an authority is "independent" or not, the Court proceeds from the following criteria *(Findlay v. the United Kingdom,* app. no. 22 107/93): 1) the procedure for the appointment of its members and the duration of their term of office; 2) guarantees of external pressure; 3) external signs of independence.

All the items considered are an ingetral component of the right to a fair trial within the meaning of Clause 1 of Article 6 of the Convention and serve as guarantees laid down by the European Convention on Human Rights and Fundamental Freedoms and the practice of the European Court of Human Rights, as the most effective regional international system for the protection of human rights at the time being[6].

Today it can be stated that national courts apply the case law of the Court and the provisions of the Convention, mainly in the absence of a specific normative provision of national law, on the basis of which a case could be resolved in substance. However, as shown by the practice of international judicial human rights bodies, these bodies are taking considerable efforts to initiate the extensive application of the norms of international human rights conventions by national courts. In particular, the European Court of Human Rights has repeatedly insisted on the application of the following principle: if the European Convention for the Protection of Human Rights is the legal basis to which the applicant may refer, then he should do so in the national court or even the national court itself should apply to the relevant standard of the Convention[7].

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[5] Ткачук О. Витоки сучасного розуміння права на справедливий суд / О. Ткачук // Visegrad Journal on Human Rights. – 2016. – № 1/2, 190–191.

[6] Лемак О. Право на судовий захист: конституційно-правовий аспект : автореф. дис. ... канд. юрид. наук : спец. 12.00.02 «Конституційне право; муніципальне право» / О. Лемак ; Ужгородський національний університет. – Харків, 2014. – 20 с.

[7] Дженіс М. Європейське право у галузі прав людини: джерела і практика застосування / М. Дженіс, Р. Кей, Е. Бредлі ; пер. з англ. О. Савченка. – К. : «АртЕк», 1997. – 452 с.

At the same time, when applying the provisions of the Convention and the Court's practice in national courts, the following points should be taken into account:

1) the provisions of the Convention and the judgments of the Court have the supremacy of national law for the Member States;
2) if the rights are not provided for in the Fundamental Law, their exercise is possible directly on the basis of the provisions of the Convention;
3) the existence of gaps in national legislation does not prevent a person from appealing in the national court to the rules of the Convention, and national courts may make decisions on their basis, including in the event of a gap in respect of those human rights and freedoms established by the Convention or the Court's rulings;
4) in cases where legislative regulation at the national level is carried out on the basis of a judgment of the Court (i.e., after proper finding of the relevant gaps by the Court), the application of these norms requires referring to the provisions of the Convention or the practice of the Court, since another approach would make it impossible to apply such rules of national law in the light of international human rights standards.

Today, the problem in Ukraine remains that judicial practice does not recognize the de facto direct effect of the standards of human rights and fundamental freedoms in so-called difficult cases, when these standards cannot be directly applied by courts, but need to be specified by adopting appropriate laws that would determine the content of these rights and set the limits and restrictions on their exercise. This position contradicts the principle of direct effect of the Constitution, according to which "appeal to the court to protect the constitutional rights and freedoms of a human and citizen directly on the basis of the standards of the Constitution of Ukraine is guaranteed" (Part 3 of Article 8 of the Constitution of Ukraine). The aforesaid points out that the courts cannot refuse to administer justice or to protect the violated right on the grounds of lack of specific legislation or the presence of gaps in legislation. In such cases, the practice of the European Court of Human Rights is intended to play a decisive role, since the latter, together with the provisions of the European Convention on Human Rights and Fundamental Freedoms, must be directly applicable by national courts as a legal instrument designed to compensate for the lack of specific legislation and to facilitate the settlement of legal cases under conditions of gaps in national legislation.

In many judgments, the European Court of Human Rights has explicitly identified violations of the Convention arising from gaps in national law (see, for example, Kharchenko v. Ukraine, Vierentsov v. Ukraine, Kawka v. Poland cases). In such cases, the Court finds that the national law of the Member States does not contain the relevant provision of the Convention, on the basis of which a decision should have been made, but it was not adopted. At the same time, the European Court of Human Rights does not in any way consider gaps in the national legislation of the Member States of the Council of Europe as a ground for non-compliance by these States with their obligations under the Convention (in particular, such legal position was expressed by the Court in the judgment in "Zimmermann and Steiner v. Switzerland").

Conclusions. As an integral part of the principle of the rule of law, the right to a fair trial today appears as the fundamental legal value of any democratic society. The Court's standards set out in its judgments on the safeguards stipulated in Article 6 of the Convention are an implementation measure requiring a series of actions by Ukraine, without which it is impossible to fulfill by the latter its obligations as a Member State under the Convention or the safeguarding of fundamental rights and freedoms in general. This is justified by the fact that it is the Court's practice that is the legal mechanism allowing to understand and correctly apply the provisions of the Convention.

Summary

The article investigates into the essence and main structural elements of the right to a fair trial. The analysis of practices of the European Court of Human Rights gives grounds to reveal the modern understanding of the concept of the right to a fair trial as one of the elements of the rule of law principle. The conceptual basis of improving the process of implementation of practices of the European Court of Human Rights in the national legal system on the application of Article 6 of the Convention is studied; the direct impact thereof on the right to a fair trial in Ukraine is analyzed.

Анотація

У статті з'ясовується сутність і основні структурні елементи права на справедливий суд. На підставі аналізу практики Європейського суду з прав людини розкрито сучасне розуміння права на справедливий суд як одного з елементів принципу верховенства права. Визначаються концептуальні засади удосконалення процесу імплементації в національну правову систему практики Європейського суду з прав людини щодо застосування ст. 6 Конвенції, аналізується її безпосередній вплив на забезпечення права на справедливий суд в Україні.

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