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THE IMPACT OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON CERTAIN ISSUES OF INDEPENDENCE AND IMMUNITY OF ADMINISTRATIVE COURT JUDGES

ВПЛИВ ПРАКТИКИ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ НА ОКРЕМІ ПИТАННЯ ЩОДО НЕЗАЛЕЖНОСТІ ТА НЕДОТОРКАНОСТІ СУДДІ АДМІНІСТРАТИВНОГО СУДУ

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The article examines the impact of the case law of the European Court of Human Rights on certain issues of independence and immunity of an administrative court judge. The author points out that judicial independence is an integral institutional element of the right to a court in administrative proceedings. In this context, today there is a need to study the provisions of the ECHR and the ECHR case-law on court independence not only from the perspective of introducing a certain theoretical approach, but also based on the needs of the practice of application of paragraph 1 of Article 6 of the Convention, constitutional provisions, procedural legislation and improvement of the qualitative level of professionalism of judicial practice.

It is noted that in the construction of the right to a court, the independence of the court is of paramount importance. It is no coincidence that all national legislations formulate this provision as a principle of the judicial system and judicial proceedings. The ECtHR has repeatedly noted that the importance of the separation of powers between the executive and judicial branches of government is becoming increasingly important in the ECtHR case law. However, neither Article 6 nor any other provision of the Convention requires states to comply with any theoretical constitutional doctrine as such, which provides for permissible limits of interaction between the two branches of power. In this sense, the ECtHR is only interested in the question of whether there are procedural guarantees for the court to be considered independent and objectively impartial.

It is concluded that in its practice the ECHR considers the issue of judicial independence. The following may be considered as its guarantees: peculiarities of appointment and dismissal of a judge; duration and stability of the term of office; impossibility of removal from office; financial and social security of judges; independence from external influence on a judge by other judges and higher courts, executive and legislative branches of power, as well as parties to the proceedings; availability of external attributes of independence. At the same time, in the ECHR case law, the concept of judicial independence acquires an independent meaning given the specifics of its manifestations in the field of administrative justice. Given the effect of the principle of external attributes of the administration of justice in the aspect of the right to a court, the independence of the court is considered together with the requirement of its objective impartiality, which indicates a certain fusion of these concepts in the ECHR case law, their similarity.

Key words: administrative justice, independence of a judge, immunity of an administrative court judge, administrative court, judge.

У статті досліджено вплив практики європейського суду з прав людини на окремі питання щодо незалежності та недоторканості судді адміністративного суду. Вказано, що незалежність суду є невід'ємним інституційним елементом права на суд в адміністративному судочинстві. У цьому контексті сьогодні існує потреба у дослідженні положень ЄКПЛ та практики ЄСПЛ щодо незалежності суду не лише з точки зору запровадження певного теоретичного підходу, а й виходячи з потреб практики застосування п. 1 ст. 1 ст. 6 Конвенції, конституційних положень, процесуального законодавства та підвищення якісного рівня професіоналізму судової практики.

Зазначено, що у конструкції права на суд першочергове значення має незалежність суду. Не випадково в усіх національних законодавствах це положення формується як принцип судоустрою та судочинства. ЄСПЛ неодноразово зазначав, що важливість поділу влади між виконавчою та судовою гілками влади набуває все більшого значення в практиці ЄСПЛ. Але ні ст. 6, ані будь-яке інше положення Конвенції не вимагає від держав дотримання будь-якої теоретичної конституційної доктрини як такої, що передбачає допустимі межі взаємодії між двома гілками влади. У цьому сенсі ЄСПЛ цікавить лише питання, чи існують процесуальні гарантії для того, щоб суд вважався незалежним та об'єктивно неупередженим.

Зроблено висновок, що незалежність суддів є невід'ємним інституційним елементом права на суд в адміністративному судочинстві. У цьому контексті сьогодні існує потреба у дослідженні положень ЄКПЛ та практики ЄСПЛ щодо незалежності суду не лише з точки зору запровадження певного теоретичного підходу, а й виходячи з потреб практики застосування п. 1 ст. 6 ЄКПЛ, конституційних положень, процесуального законодавства та підвищення якості судової практики.

Ключові слова: адміністративне судочинство, незалежність судді, недоторканість судді адміністративного суду, адміністративний суд, суддя.

On 10 July 1998 in Lisbon, participants in a comprehensive seminar on the law on the status of judges, organised by the Council of Europe, adopted the European Charter on the Law on the Status of Judges, which took into account:

1) the provisions of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which in the relevant part provides that everyone ... has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established in accordance with the law;

2) the United Nations Basic Principles on the Independence of the Judiciary, endorsed by the United Nations General Assembly in November 1985;

3) Recommendation № R (94) 12 of the Committee of Ministers to member states on the independence, efficiency and role of judges.

The adoption of this Charter was conditioned by the need to have an official document intended for all European states, which would set out provisions aimed at ensuring the greatest guarantees of the competence, independence and impartiality of judges. This Charter is designed to promote more effective development of the independence of judges, strengthening the rule of law, and protecting individual freedom in democratic states.

The provisions of the European Charter on the Law "On the Status of Judges" are of a recommendatory nature and should be taken into account by European countries in their legislation on the status of judges in order to ensure the highest level of guarantees in specific formulations. National laws may not be amended to reduce the level of safeguards already achieved in the countries concerned.

The purpose of the Law on the Status of Judges is to ensure the competence, independence and impartiality that

every person legitimately expects when applying to the court for the protection of his or her rights and interests. It should not contain provisions or procedures that could undermine confidence in such competence, independence and impartiality.

In each European state, the basic principles of the law on the status of judges are set out in internal norms of the highest level, and its rules are set out in norms not lower than the legislative level. In Ukrainian legislation, guarantees of competence, independence and impartiality of judges are established by the Constitution of Ukraine, the Law of Ukraine "On the Judiciary and the Status of Judges" dated 02.06.2016 № 1402-VIII [1].

According to Articles 124, 126, 129 of the Constitution of Ukraine, justice in Ukraine is administered exclusively by the courts. Delegation of functions of courts, as well as appropriation of these functions by other bodies or officials shall not be allowed. The independence and immunity of judges are guaranteed by the Constitution and laws of Ukraine. Influencing judges in any way is prohibited. A judge may not be detained or arrested without the consent of the Verkhovna Rada of Ukraine until a guilty verdict is passed by the court. The state ensures the personal security of judges and their families. Judges in the administration of justice are independent and subject only to the law.

According to parts two of Articles 6 and 19 of the Basic Law of Ukraine, bodies of legislative, executive and judicial power exercise their powers within the limits established by this Constitution and in accordance with the laws of Ukraine. Bodies of state power and bodies of local self-government, their officials are obliged to act only on the basis, within the limits of authority and in the manner envisaged by the Constitution and laws of Ukraine.

Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 in paragraph 1 of Article 6 contains the provision that everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial court established by law, which will decide a dispute regarding his rights and obligations of a civil nature. This Convention provision is called the "right to a court" in the literature and was developed in the practice of the European Court of Human Rights.

The independence of the court is an integral institutional element of the right to a court in administrative proceedings. In this context, today there is a need to study the provisions of the ECHR and the practice of the ECtHR on the independence of the court, not only from the point of view of introducing a certain theoretical approach, but also based on the needs of the practice of applying para. 1 of Art. 6 of the ECHR, constitutional provisions, procedural legislation and improving the quality level of professionalism of judicial practice.

In the construction of the right to a court, the independence of the court is of paramount importance. It is no coincidence that in all national legislation this provision is formed as a principle of the judicial system and court proceedings. The ECtHR has repeatedly noted that the importance of the separation of powers between the executive and judicial branches is becoming increasingly important in the case-law of the ECtHR. But neither Art. 6, nor any other provision of the ECHR requires States to adhere to any theoretical constitutional doctrine as providing for permissible limits on interaction between the two branches. In this sense, the ECtHR is only interested in the question of whether there are procedural guarantees for a court to be considered independent and objectively impartial.

From this point of view, the ECtHR has developed criteria by which a particular judicial body can be assessed as independent in the context of para. 1 of Art. 6 ECHR. In particular, the independence of the court is evidenced by: 1) the method of appointing judges; 2) the duration of their term of office; 3) availability of guarantees against external influence; 4) the presence of external attributes of independence.

At the same time, as stated in paragraph 11 of Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and duties, adopted on 17.11.2010, external independence is not a prerogative or a privilege granted to satisfy the own interests of judges.

It is granted in the interests of the rule of law and individuals seeking and expecting impartial justice. The independence of judges should be understood as a guarantee of freedom, respect for human rights and the impartial application of the law. The impartiality and independence of judges are necessary to guarantee the equality of the parties before the court" (§ 11). In addition, the Consultative Council of European Judges in paragraph 12 of Opinion № 1 (2001) emphasizes: "The judiciary should be trusted not only by the parties to an individual case, but also by society as a whole. Thus, a judge should not just actually be free from any connections, attachments, biases, he or she should also be considered free from it from the point of view of a reasonable observer. Otherwise, trust in the judiciary could be undermined".

There is, therefore, a close connection between independence and objective impartiality. For this reason, the ECtHR usually considers these two claims together (Findlay v. the United Kingdom, § 73). The principles applicable in determining whether a "court" can be considered "independent and impartial" also apply to professional judges and juries (Holm v. Sweden, § 30).

Here are a few decisions of the ECtHR against Ukraine. Thus, in the case of "Sovtransavto Holding v. Ukraine" [2], the President in his letter ordered the Chairman of the Supreme Arbitration Court to "protect the interests of the citizens of Ukraine" and "the interests of the state". In turn, the Chairman of the High Administrative Court of Ukraine sent this letter to the Chairman of the Arbitration Court of Kyiv region so that he could take it into account during the consideration of the case. Confused by such a blatant disregard for the principle of separation of powers, the ECtHR noted that these "... numerous acts of interference in the judicial process... are in themselves incompatible with the notion of an "independent and impartial tribunal" ... testify to the lack of respect on the part of state bodies for the very function of the judiciary." The decision of the ECHR in the case of "Bochan vs. Ukraine" states that taking into account the circumstances of the case, in which the Supreme Court changed the territorial jurisdiction, and the lack of sufficient justification in the decisions of national courts, and considering these issues together and in their entirety, the ECtHR considers that the applicant's right to a fair hearing by an independent and impartial court within the meaning of paragraph 1 of Art. 6 of the Labor Code was violated. The ECtHR came to the same conclusion in the case of Feldman v. Ukraine.

At its regular meeting on September 23–25, 2019, the Committee of Ministers of the Council of Europe adopted the Final Resolution in the case of Sovtransavto-Holding v. Ukraine, according to which it terminated the supervision over the implementation of the judgment of the European Court of Human Rights in this case [3].

The judgment of the European Court of Human Rights in this case, adopted on 25 July 2002 and finding a violation of Article 6 § 1 of the Convention on the right to a fair hearing by an independent and impartial tribunal, as well as Article 1 of Protocol № 1 to the Convention on the right to peaceful enjoyment of property, was of utmost importance for the development of the judiciary in Ukraine in accordance with European standards.

The Committee of Ministers of the Council of Europe adopted a decision of 23–25 September 2019 on the procedure for supervising the implementation by Ukraine of judgments of the European Court of Human Rights in the group of cases "Oleksandr Volkov v. Ukraine" (application no. 21722/11), which concerns a number of issues related to the independence and impartiality of the judiciary and the system of judicial discipline and career.

In this decision, the Committee of Ministers of the Council of Europe, in particular:

– calls on the Ukrainian authorities to provide updated information on the outcome of the proceedings in the cases of Kulikov and Others v. Ukraine and Denisov v. Ukraine, and encourages them to conclude these proceedings as soon as possible with a view to fully restoring the applicants' pre-violation status, thereby ensuring restitutio in integrum;

– invites the authorities to provide information on the practice of the High Council of Justice in subsequent proceedings regarding the appealed decisions that were overturned by the Supreme Court, and information on the scale of sanctions for individual judicial disciplinary offences;

– invites the authorities to provide information on the measures taken to ensure the prompt start of the preliminary consideration of any disciplinary case by the HCJ and calls on them to consider the need to take or not to take any other additional measures to ensure the consideration of cases within the established time frame at this stage of the proceedings; invites the authorities to provide information on the application by the High Council of Justice of the statute of limitations for bringing judges to disciplinary responsibility.

The High Council of Justice considers all cases under the decision of the ECHR "Kulikov and others v. Ukraine", which were sent for consideration after consideration of these cases by the Supreme Court, at a plenary session by the entire composition of the High Council of Justice.

After reviewing the cases by the decision of the ECHR "Kulykov and others v. Ukraine" by the national courts: in 8 cases the decision of the High Council of Justice and the resolution of the Verkhovna Rada of Ukraine were overturned; in 7 cases only the resolution of the Verkhovna Rada of Ukraine was canceled; in 2 cases the decision of the High Council of Justice and the Decree of the President of Ukraine were canceled [4].

For the most part, in such cases, the High Council of Justice establishes that judges have committed actions that, under the current legal regulation, can be recognized as one-time gross misconduct resulting in dismissal from the position of a judge.

However, since such misdemeanors were committed outside the time limits for bringing judges to liability (three years from the date of their commission), the High Council of Justice did not develop a final legal attitude to the issue of applying the terms for bringing judges to liability in such cases.

At the same time, the Administrative Court of Cassation within the Supreme Court recognized that bringing judges to liability beyond a three-year period does not meet the requirements of the law, but such a conclusion negates disciplinary practice, and therefore the final decision in these cases was made by the Grand Chamber of the Supreme Court [5].

In particular, the Resolution of May 14, 2020 in this case states that the introduction of a statute of limitations for bringing a judge to liability for actions subject to violation of the oath is a measure that improves the position of a judge compared to the situation when such a period was not determined by law, and therefore the application of a three-year statute of limitations for bringing a judge to disciplinary liability does not contradict the provisions of Article 58 of the Constitution of UkraineIn accordance with part one of Article 56 of Law No. 1798-VIII, the issue of dismissal of a judge on the grounds specified in paragraphs 2, 3, 5 and 6 of part six of Article 126 of the Constitution of Ukraine is considered at a meeting of the HCJ.

This article does not set deadlines for the HCJ decision and does not provide for the application of deadlines when considering the submission of the relevant body on the dismissal of a judge from office. Thus, the Grand Chamber of the Supreme Court pointed out the erroneousness of the conclusions of the court of first instance that the disciplinary penalty against the plaintiff was applied after the expiration of the period provided for by law.

Similar conclusions are set out in the resolutions of the Grand Chamber of the Supreme Court dated March 28, 2018 in case № P/800/310/17, dated April 5, 2018 in case № 800/523/17, dated June 21, 2018 in cases № 11-272sap18 and № 11-78sap18, dated November 1, 2018 in case № 800/493/15 (P/9901/311/18), dated March 12, 2020 in case № 9901/777/18 [5].

However, it should be noted that in the case № 9901/187/19, judges of the Grand Chamber of the Supreme Court Lyashchenko N. P., Britanchuk V. V ., Hrytsiv M. I., Yelenina Zh.M., Prokopenko O. B., Sytnik O. M. A separate opinion was formed on May 14, 2020, which states that by declaring illegal the Resolution of the Verkhovna Rada of Ukraine No. 5126-VI of July 5, 2012 on the dismissal of the plaintiff from the position of a judge, the court proceeded from the fact that the contested resolution is an individual act that performed the function of individual regulation of the rights and obligations of the plaintiff and became the basis for his illegal dismissal from the position of a judge, Therefore, instead of declaring it illegal, it is necessary to apply such a remedy to protect the violated right of the plaintiff as recognizing the appealed resolution as illegal and canceling it. The Administrative Court of Cassation noted that the decision on partial satisfaction of the claim was made not on the grounds indicated by the plaintiff, but in accordance with the provisions of the Law of Ukraine "On the Execution of Judgments and Application of the Practice of the European Court of Human Rights" in order to properly enforce the decision of the ECHR in the cases of "Kulikov and others v. Ukraine", "Oleksandr Volkov v. Ukraine" by re-examining the case in connection with the obligation of the state to comply with the ECHR decision in cases against Ukraine and with the need to elimination of the causes of Ukraine's violation of the Convention.

At the same time, the ECHR in the case of Kulikov and Others v. Ukraine, rejecting the applicants' complaints about the need to take general measures to reform the system of disciplinary liability of judges in Ukraine, noted that in accordance with its instruction to take measures of a general nature in the case of Oleksandr Volkov v. Ukraine, there is no need to make a similar instruction in this case. That is, the Court pointed out that this case testifies to serious systemic problems with the functioning of the judiciary in Ukraine. In particular, the violations found in the case suggest that the system of judicial discipline in Ukraine is not properly organized, and it does not ensure sufficient separation of the judiciary from other branches of state power. Moreover, it does not provide sufficient safeguards against the abuse and misuse of disciplinary measures, which is detrimental to the independence of the judiciary, while the latter is one of the most important values that support the effectiveness of democracies.

The Court therefore considers it necessary to emphasise that Ukraine must immediately introduce into its legal system the general reforms referred to above. At the same time, the Ukrainian authorities must take due account of this decision, the relevant case-law of the Court and the relevant recommendations, resolutions and decisions of the Committee of Ministers (paragraphs 199, 201 of the judgment in the case of Oleksandr Volkov v. Ukraine).

The Government noted that significant legislative measures had been taken in order to reform the system of disciplinary liability of judges in Ukraine. The Government submitted that following the events of February 2014, which had led to an extraordinary change in the state authorities in Ukraine, there had been a positive trend towards the protection of human rights, in particular the rights of judges. As an example, the Government cited the case of Mr Kovzel (application no. 35336/11), who had been reinstated. Thus, the Government argued that they could decide on their own whether to take individual measures.

As regards the adoption of measures of a case-by-case nature, namely the reinstatement of the applicants, in a large number of cases in which domestic proceedings were found to be contrary to the Convention, the Court held that the most appropriate form of compensation would be the reopening of domestic proceedings. In the case of Oleksandr Volkov v. Ukraine, the Court noted that the resumption of domestic proceedings was not an appropriate measure. Having regard to the circumstances leading to the violations, as well as the need for a major reform of the system of disciplinary liability of judges, the Court in that case concluded that there was no reason to believe that the applicant's case would be reviewed in the near future in accordance with the principles of the Convention and instructed the Government to ensure that the applicant was reinstated.

The Court noted that, as of today, a full-scale judicial reform is being implemented in Ukraine, which includes amendments to the Constitution of Ukraine and laws of Ukraine, as well as institutional changes. In this connection, the Court is not in a position at present to assess the effectiveness of the reopening of domestic proceedings, should the applicants so request. However, having regard to the length and circumstances of the applications under consideration, it cannot be concluded that these substantially new circumstances render the relevant domestic proceedings prima facie futile and inconclusive. Thus, the Court does not follow the approach taken in the case of Oleksandr Volkov v. Ukraine regarding the instruction to take measures of an individual nature, and rejects the relevant request.

That is, taking into account the ongoing full-scale judicial reform, and the Government's arguments about positive trends in the protection of human rights, in particular, the rights of judges and the ability to independently resolve the issue of taking measures of an individual nature, in particular, by reinstating judges in office, the ECtHR decided not to follow the approach taken in the case of Oleksandr Volkov v. Ukraine regarding the instruction to take measures of an individual nature. and rejected the request.

Thus, since it is impossible to assess the effectiveness of the resumption of domestic proceedings at the time of the Court's consideration of the case, but at least at first glance there is no reason to believe that the resumption of domestic proceedings will be futile and fruitless, the ECtHR did not apply individual measures, unlike the case of Oleksandr Volkov v. Ukraine, where the situation in force at that time left no real choice regarding individual measures, in which the Court expressly obliged the State to ensure that the applicant was reinstated as soon as possible.

On the other hand, after the final decision of the ECtHR, which was issued on the applications alleging violations of the plaintiffs' rights guaranteed by Articles 6 and 8 of the Convention, as a result of their dismissals from the office of judges and the ineffectiveness of appealing against such dismissals in the courts (which was stated by the Court), the Plaintiff was repeatedly subjected to disciplinary proceedings in the form of dismissal, despite the violations established by the Court, on the same grounds and in similar circumstances, which undermines confidence in the effectiveness of such a method of restoring violated rights as the resumption of domestic proceedings and casts doubt on the Government's assertion that it is possible to independently decide on the issue of taking measures of an individual nature."

In addition, in the same case, Judge of the Grand Chamber of the Supreme Court Antsupova T. O. also formed a Dissenting Opinion, in which the judge pointed out that the conclusion of the Grand Chamber of the Supreme Court regarding the application of the statute of limitations for bringing a judge to disciplinary liability does not meet the requirements of the law. The judge noted that "since the disciplinary penalty in the form of dismissal from the position of a judge was applied to the plaintiff by the decision appealed in this case, I believe that the three-year period for bringing a judge to liability for violation of the oath should be calculated from the date of violation of the oath to the date of the decision to apply a disciplinary penalty to the judge."

The analysis allows us to conclude that in its practice the ECtHR considers the issue of the independence of the judge. Its guarantees can be considered as follows: the peculiarity of appointment to the position of a judge and dismissal from it; duration and stability of the term of office; impossibility of removal from office; financial and social security of judges; independence from external influence on the judge by other judges and courts of higher instances, bodies of executive and legislative power, as well as parties to the process; the presence of external attributes of independence. At the same time, in the practice of the ECtHR, the concept of independence of the court acquires an independent meaning in view of the specifics of its manifestations in the field of administrative proceedings. Taking into account the effect of the principle of the presence of external attributes of the administration of justice in the aspect of the right to a court, the independence of the court is considered together with the requirement of its objective impartiality, which indicates a certain fusion of these concepts in the practice of the ECtHR, their similarity.

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