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LEGAL EFFECT OF THE GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS DECISIONS (2015 YEAR REVIEW)

Утченко К. Ю. Правове значення рішень Великої палати Європейського суду з прав людини (огляд за 2015 рік)

Проаналізовано рішення Великої палати Європейського суду з прав людини за 2015 рік. Досліджено основні статті Конвенції про захист прав людини та основоположних свобод, на порушення яких звертає увагу Велика палата. Деталізовано аналіз шляхів вирішення проблеми системного невиконання прийнятих рішень національними судами.

Ключові слова: Конвенція, позов, рішення, справа.

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Systemic non-fulfillment of judicial decisions in Ukraine became the result of numerous applications to the European Court of Human Rights (hereinafter referred to as ECHR). Particularly, according to the released data of the ECHR, the number of cases submitted for consideration against Ukraine is almost the biggest among all member states of the Council of Europe. Currently, Ukraine occupies the fourth place after Russia, Turkey, and Romania as to the number of citizens' applications to the ECHR. Actually, every tenth application to Strasbourg is submitted by the citizen of Ukraine. Today there are 8 thousand complaints of Ukrainian plaintiffs under consideration. As of March 31, 2015 64, 850 complaints were waiting for the ECHR decision. Over a half of them were against Ukraine, Russia, Turkey, and Italy [3]. Due to the abovementioned issues year 2015 can become decisive because of taking landmark decisions with respect of Ukraine.

The phenomenon of cases consideration by the Grand Chamber of ECHR is rather complicated. Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides creating three different types of bodies within the Court: commissions, chambers, and the Grand Chamber [1].

The Grand Chamber includes seventeen judges. In addition to the member of the Grand Chamber by virtue of

his position who holds sittings on the same terms which are determined with respect of the member of the chamber by virtue of his position, paragraph 3 of article 27 also considers as members of the Grand Chamber the Head of the ECHR, deputies of the Head, heads of chambers and other judges who are determined according to ECHR procedure.

The Grand Chamber is empowered to consider only those cases which have been transferred to it and only in three cases, according to article 30, the chamber may go back from it's jurisdiction in favor of the Grand Chamber:

– if the case is raising a serious question connected with the interpretation of the Convention or protocols to it;

– if solving of the matter may result into consequences which contravene the decision earlier taken by the ECHR;

– if neither party in the case has any objection to it.

It performs two functions. On one side, it acts as the first instance in cases which consider important matters of interpretation. On the other side, it acts as the court of the second instance.

The ECHR has founded two Grand Chambers. Each of them consists of 17 judges. Permanent of them are president and two vice-presidents, and two other heads of Chambers. Different criteria are taken into account in the course of the judges' distribution among chambers. These are first of all the respective representation of women and geographical distribution. The national judge also participates in the consideration of cases.

If any decision is appealed to the Grand Chamber as the court of the second instance, the filtration commission should firstly take the decision on the sufficient significance of such a case for the Grand Chamber to start its consideration.

The fact whether the Grand Chamber is overloaded with cases and whether the Strasbourg procedure will be completed within the reasonable period of time influence filtration commissions when they take decisions on transferring complaints to the Grand Chamber for consideration. The 11th additional Protocol and new Order of Procedure of the ECHR say that the sentence/decision shall be settled to the Grand Chamber only in exceptional cases.

Resolutions on unacceptability and decisions taken by the committee or the Grand Chamber are final and may not be appealed. But within three months upon taking a decision on the case by the chamber, the parties may file a motion on the transfer of the case for the Grand Chamber revision. Such a motion is considered by the judicial panel which takes the decision on the appropriateness of its granting.

Despite the fact that for the period of 1959-2014, the ECHR had considered 10, 109 cases only, one third of cases have managed to reach the level of the Grand Chamber. At the same time, the Grand Chamber of the ECHR has a great deal of experience in taking decisions related member states of the Council of Europe which are of special importance for all European countries including Ukraine.

We settle on the analysis of the most significant decisions of the Grand Chamber of the ECHR during 2015 year, for example, Grand Chamber of the ECHR in the case "Chigrag and

other against Armenia» of June 16, 2015. This case is based on the suit filed on April 6, 2005 by six citizens of Azerbaijan outcast from Lachinskiy district of Azerbaijan as the result of the aggression of Armenia against Azerbaijan. Actually people who filed the suit to the court were deprived of the opportunity to return to their houses in Lachinskiy district because of the occupation of Lachinskiy district by Armenian armed forces. So, they could not use property located there. Actually, there is a clear analogy with internally displaced persons on the territory of Ukraine. With that, statements of case of plaintiffs to the ECHR say that this is the continuation of infringement of ownership rights fixed by article 1 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) in respect of personal family life fixed by article 8 of the Convention. It is also stated that absence of the efficient means connected with the above-mentioned complaints is the violation of article 13 of the Convention. As the result, in connection with all above-mentioned claims, they have filed a complaint with respect to the violation of article 14 of the Convention because they suffered from discrimination from the point of view of the ethnical and religious affiliation.

The ECHR has come to the following conclusion that according to the international law, occupation is understood as the fact of implementation of the actual power by one state on the territory or part of the territory of another state. According to the conclusion of the ECHR, demands of the actual power in wide sense are considered as a synonym of the efficient control. Eventually, the ECHR having considered provided evidences came to the following conclusion: as the result of the military occupation of these territories, Armenia was implementing and continues to implement an efficient control over the Nagorno-Karabakh and other occupied territories (paragraphs 96 and 168).

Continuing the topic of the military aggression of the Russian Federation we additionally mark the decision of the Grand Chamber "Georgia vs. Ukraine» of July 3, 2014. With the majority of voices (primarily 16 of 17, and unanimously on certain matters), the Grand Chamber has recognized on that case that the Russian Federation broke a number of articles of the Convention, particularly article 3, that prohibits tortures and inhuman degrading treatment, article 5 on the right to liberty and personal inviolability, article 13 on the right to an effective remedy, article 4 which prohibits the collective deportation of foreigners. The ECHR found that in autumn 2006, state power bodies of the Russian Federation were implementing the well-coordinated policy aimed at the arrest, imprisonment and deportation of Georgia descents from the territory of the Russian Federation and were taking administrative measures aimed at the implementation of that policy. The above-mentioned policy and administrative measures related its implementation contradict the requirements of the Convention.

Not less important problem in Ukraine is the development of communication technologies. On June 16, 2015, the Grand Chamber of the ECHR

in its resolution on "Delphi AS vs. Estonia» case came to the conclusion that it is not enough to have the automatic system of comments blocking due to using abusive words in them. It is evidently confirmed by this case: the system used by Delphi has not blocked inadmissible comments because they explicitly contained the hate speech and appeals to violence. Actually, such an approach is negotiated with the position of the Plenum of the Supreme Court of Ukraine (i.e. the decision of the Plenum of the Supreme Court of Ukraine No. 1 dated February 27, 2009) according to it in case of impossibility to establish the author of the comment, the defendant on the case can be the owner of the resource which has provided the possibility for untrustworthy information posting [6]. If the author of the comment is established, the Plenum of the Supreme Court of Ukraine considers it and website owner appropriate multiple defendants. Actually one of the main problems in protection from untrustworthy information distributed via web-sites is obtaining appropriate evidences of the fact that information has been posted in fact. The reason is predetermined by the technical peculiarities of the network which enable (unlike printed mass media) removing of problem information [2].

If we return to more social and domestic problems, we draw attention to the decision of the ECHR dated September 11, 2015. The decision was taken on the grounds of the continuous hearing in Spanish under participation of Tuso Company which deals with the installation of security systems. The decision was taken that the employees without the fixed place of business should receive payment for the time spent for such trips. It can mean that the companies which hire such employees like electricians, installation fitters, social workers and sales representatives can violate the rules of the EU on the labor hours if they have decided to go back from the regional office. The fact that employees start and finish trips from their home directly results from the decision of the employer on the dissolution of regional offices and not from the willingness of employees. The demand on employees to bear the burden of personal employer selection would contradict to the purpose of safety and health protection of employees indicated in the directive. It includes the necessity of guaranteeing to the employees the minimum day-off duration. By the way, earlier, the Organization for Economic Cooperation and Development published the rating of labour productivity among European countries. According to the rating, citizens of Russia and Greece work most of all in Europe but in comparison with the representatives of other European states their labour is the least efficient.

During several years, there is a discussion in Ukraine related necessity of introduction of the possibility of euthanasia on the legislative level. On June 5, 2015, the Grand Chamber on case "Lambert and other v. France» with 12 voices against 5 decided that euthanasia would not break the second article of the Convention which established the human right to life and stated that "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his

conviction of a crime for which this penalty is provided by law.» The ECHR has recognized that the decision of the State Council (Supreme Administrative Court in France) on termination of life sustaining is not covered by restrictions which are imposed by the Convention. Now, the Law "On the right for death» is in force. It was adopted in March 2015. According to this law, doctors may cause the death-sick to fall into the condition of the deep sleep till the moment when he dies. This measure is applied in the case when the patient experiences unbearable pain or when the treatment is not resultative. An additional point is that the patient can take the decision to terminate taking medicines, and in this case he will be cast into sleep. The patient also can leave instructions in case that he is in a state of insensibility. The previous version of the law which was adopted in 2005 and was effective within the whole process declared the right for passive euthanasia according to the decision of the council of physicians.

Analyzing the above-mentioned decisions of the ECHR and summing up the above-said, we note that for many years one of the most topical problems connected with the ECHR is non-satisfaction of its judgments. The head of the Supreme Court of Ukraine Yaroslav Romaniuk has noted that the representative of the ECHR indicated that over 10, 000 of 16, 000 are the suits against Ukraine recognized as acceptable by the ECHR due to the non-satisfaction of court judgments delivered by the Ukrainian courts [7].

Though, we note that additionally to the effective Law of Ukraine «On implementation of decisions and application of the practice of the European Court of Human Rights» of February 23, 2006 [4], in 2014, the Verkhovna Rada of Ukraine registered the draft Law on amendments being made to the Law of Ukraine «On implementation of decisions and application of the practice of the European Court of Human Rights» (as to the enforcement of judicial decisions) [5].

The draft Law prepared in the Committee of the Verkhovna Rada of Ukraine on the matters of legal policy and justice aimed at solving most old acute problems which slow down the implementation of decisions of the ECHR. So, the payment of the compensation of fair satisfaction assigned by ECHR is introduced not only in the monetary but also other form specified by the law, for example, at the expenses of the bill payment. The government representative for the ECHR the possibility to provide analytical conclusions in the form of the legal positions grounded by the practice of the ECHR related the availability or absence of grounds for the ECHR to make a statement of the Convention violation by national courts in specific cases. The issue of the period of the ECHR decisions enforcement is being solved, the procedure of their translation is being optimized, and the access to them is being simplified. It is also suggested by the draft Law to renew the terms for the ECHR decisions enforcement to those persons who have received the denials in the ECHR decisions implementation for any reason.

We hope that the draft law aimed at improvement of procedures of the ECHR decisions enforcement and overall

strengthening of the court mechanism of protection of human rights in the national legal system will be approved by the Verkhovna Rada of Ukraine and signed by the President of Ukraine in the nearest future regarding comments and suggestions voiced in the academic circles and general public.

An interesting innovation aimed at overcoming the problem of systemic non-fulfillment of the ECHR decisions is today offered by the Ministry of justice of Ukraine, i.e. introduction of the institute of private enforcement officers. But the following fact should be mentioned. Upon launching the activity of private enforcement officers, certain foreign countries have unexpectedly faced the following phenomenon: private enforcement officers were implementing only those decisions which already have been implemented by state enforcement officers but the enforcement fee was accumulating in private pockets. At the same time, "problematic» decisions which have not been earlier implemented hereafter remained for implementation by state enforcement officers and were not implemented [7].

According to the standards of the Council of Europe every taken the ECHR decision demonstrates the general level of legal culture of the state and influences not only the law but also development of the national legislation of the Convention member states. That is why further improvement of the legal, organizational and institutional regulation in the sphere of the ECHR decisions enforcement is important and necessary for Ukraine particularly on the way of associating with the European Union.

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Utchenko K. Y. Legal effect of the Grand Chamber of the European Court of Human Rights decisions (2015 year review)

This article provides review of the Grand Chamber of the European Court of Human Rights decisions in 2015. Author analyzed main articles of the Convention for the Protection of Human Rights and Fundamental Freedoms and relevant case-law, primarily by the Grand Chamber. Author proposed solutions, providing execution of the European Court of Human Rights decisions in Ukraine.

Key words: the Convention, the application, the decision, the case, violation.

Утченко Е.Ю. Правовое значение решений Большой палаты Европейского суда по правам человека (обзор за 2015 год)

Проанализированы решения Большой палаты Европейского суда по правам человека за 2015 год. Исследованы основные статьи «Конвенции о защите прав человека и основных свобод», на нарушение которых обращает внимание Большая палата. Детализировано пути решения проблемы системного неисполнения принятых решений национальными судами.

Ключевые слова: Конвенция, иск, решение, дело, нарушение.

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