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**THE EXPERIENCE OF THE UK CASE LAW IN THE ESTABLISHMENT  
OF HUMAN RIGHTS ACCORDING TO THE ECHR JUDICIAL PRACTICE**

**Key words:** *judicial precedent, judicial practice, ECHR case law.*

The European Court of Human Rights refers to its practice as case law (precedent). Judicial precedent in the judicial practice of the ECHR is based on the principle of *ratio decidendi* (from Latin – the basis for resolution), and the precedent manifests itself in the fact that the Strasbourg court while deciding cases normally tends to follow the previously used approaches, unless the Court deems them necessary to be changed. In particular, in the imperative conclusion of its judgment, the Court, instead of reproducing the arguments it previously expressed, may refer to the considerations stated in its previous decisions [5; p. 71]. At the same time, the ECHR has reiterated that it is not bound by its own previous decisions and, indeed, from time to time changes its legal positions. This approach appears justified; in actuality, although the possibility of changing judicial practice does not contribute to legal certainty, it should be borne in mind that there is a dialectical contradiction between legal certainty and the development of law. Nonetheless, it can be argued that the ECHR does not always regard its own decisions as necessarily binding.

At the same time, it is important to consider how the national judicial systems should treat the ECHR case law, in particular, whether the ECHR judgments should be binding on them in one way or another, at least in certain cases, given that the parties to the Convention on Human Rights and Fundamental Freedoms (hereinafter – the Convention) follow different legal traditions belonging to either the Anglo-Saxon legal family (common law countries) or to the Romano-Germanic legal family (continental law countries).

Having examined the Anglo-Saxon precedent of England, which is a part of the United Kingdom, the latter acts precisely according to the doctrine *stare decisis* (the law should be applied equally under equal circumstances) in its more rigorous modification. Therefore, it may seem that the precedent of the ECHR should be perceived in England as an Anglo-Saxon precedent, and should occupy the highest level in the hierarchy of precedents. However, the situation is actually different – in the event of a conflict between the

precedent of the ECHR and that of the highest court in England, only the latter is applied (*Leeds City Council v. Price and others*). This assertion can be seen in the judgment of the Court of Appeal regarding the incompatibility of the 2004 ECHR precedent in the case *Connors v. United Kingdom* with that established by the House of Lords in 2003 in the case *Harrow London Borough Council v. Qazi*. As a result, it was stated that in such circumstances, the courts of England should be guided by the case law of the House of Lords rather than that of the ECHR.

The above said position received unanimous support among all members of the House of Lords in the decision following the appeal against the judgment of the Court of Appeals in the case *Leeds City Council v. Price and others*. Thus, there arises a relatively unique precedent, which has been confirmed by the highest judicial authority, regarding the priority in applying domestic law in national courts over the application of ECHR case law.

Moreover, such a conclusion of the House of Lords extends not only to the priority of the domestic precedent, but also to the priority of the domestic law. Thus, Lord Braun explained that, given the compliance of the domestic legislation with the Convention, the court cannot give more weight to human rights. Lord Hope also pointed out that if the domestic law cannot be interpreted in a manner compatible with the Convention (in the light of the ECHR practice), the domestic law should apply (para 88 of the judgment), and Lord Brown emphasized the fact that the court cannot give more weight to individual rights than it is provided for by the domestic law (para 202 of the decision) and should proceed from the fact that the domestic law is in conformity with the Convention (para 203 of the decision) [4].

At the same time, the Anglo-Saxon precedent is not perfect in terms of human rights realization. The cases of discrimination based on different criteria are not infrequent in the case law of the United Kingdom.

Thus, in the case of *Chaidan v. Godin-Mendoza* (2002), the judge of the UK District Court, based on his decision in the case of *Fitzpatrick v. Sterling Housing Association Ltd* (1999), ruled that same-sex marriages are not equivalent to marital relations. While the ECHR in the case of *Salgueiro v. Portugal* (2001) emphasized that the Convention does not allow differences based on sexual orientation [8]. Accordingly, it was stated in the case file that the word "man" (in the context of marriage) applies exclusively to heterosexual couples, in accordance with the legislation and case law of the United Kingdom. Having decided on the case *Ghaidan v. Godin-Mendoza* (2002), the ECHR noted that such a wording at the legislative level is discriminatory and contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, the Strasbourg Court explained that same-sex marriages are also considered marital [4].

An additional example is the case of *P.M. v. United Kingdom* (2005), which is illustrative to discrimination according to the legal status. The applicant was registered as the father of the child who was born of him and his partner outside the marriage. After their separation (official marriage had not been registered), the applicant was exempted from the tax on the amount that he had paid for the child's maintenance, in accordance with the separate

accommodation agreement that the latter concluded with his former partner. However, later, the tax office deprived him of this right, given that he had never been officially married to the mother of his daughter. The position of the ECHR in this case is as follows: in both cases (whether married or not), persons are parents of their children and are obliged to pay for their maintenance. Thus, unmarried parents who have established family life with their children may claim equal rights with married parents regarding contact and care. The Strasbourg Court ruled that it did not see the reasons not to treat the applicant as a parent in a marriage that divorced and lives separately from the mother in the context of a reduction in the tax on child support. The objective of this tax reduction was the desire to facilitate married parents to support a new family, so it is not clear why single parents who established such relationships could not bear the corresponding financial obligations, while equally demanding a discount [7].

Considering the precedent issues of discrimination through the prism of Ukrainian legislation, it should be emphasized that the latter is one of the most democratic, humane and legal in terms of realization of human rights under the Convention. Moreover, the conclusions of the ECHR are binding, as well as the judgments on the territory of Ukraine, which is confirmed by the Law of Ukraine «On implementation of judgments and application of the European Court of Human Rights practice» No. 3477-IV of February 23, 2006 [3]. At the same time, the provisions of the Convention have been reflected in both the Fundamental Law of the State – the Constitution and other normative legal acts [1]. Thus, the Constitution of Ukraine provides that human rights and freedoms are the highest social value of the state, while international treaties ratified by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine [2].

Consequently, following the signing of the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950 and the establishment of the European Court of Human Rights in Strasbourg in 1953, the experimental idea of protecting human rights only on the basis of the Constitution or the Convention has received a pan-European recognition. The ECHR case law is universally recognized in Europe and it holds an independent place in the continental system of law. Further consideration of the positions of the ECHR by the Anglo-Saxon legal system will serve as a progressive step towards improving the mechanism for the protection of human rights and fundamental freedoms.

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### **JUDICIAL PROTECTION OF LAND TITLE: ECHR PRACTICE**

The article deals with the ECHR judgement «Zelenchuk and Tsytsyura v. Ukraine». The position of the ECHR on the land moratorium in Ukrainian legislation has been analyzed. Conclusions regarding the possible use of the mentioned judgement in national judicial practice have been made. The significance of the judgement in the light of the requirements of the moratorium cancellation has been studied.

**Key words:** *land ownership, land title, right to land, land moratorium, compensation, ban, cancellation.*

There is no doubt that land has always been a specific and important object of legal relations. Establishment of private right to land has a long and contradictory history. Nowadays legal science sets that the beginning of new era social relationships connected with land possession started with the adoption of the Ukrainian Constitution.

The science of land law has always paid special attention to Article 14 of the Constitution. The last states that land is the main national wealth that is under the special protection of the state. According to the requirements of this article ownership of land is guaranteed. This right is acquired and realized by citizens, legal entities and the state exclusively in accordance with the law [1].