

SECTION 3.

EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

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JUDICIAL DIALOGUE: ON THE METHODS AND PRINCIPLES OF APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Key words: *European Convention on Human Rights, domestic law, concept, Cour de cassation.*

Introduction. Formal recognition of the European Convention on Human Rights (hereinafter referred to as the Convention) as part of the domestic law of the States parties to the Convention does not present particular difficulties. Although the ways of incorporating the Convention into the national legal system are different, all the States determine its status and place within their legal system (*Grabenwarter/Pabel, Europäische Menschenrechtskonvention, 6. Aufl. 2016, § 3 Rn. 2*).

Nevertheless, the effectiveness of the application of the Convention with regard to individuals largely depends on the judiciary and functioning of domestic courts. Along with the fact that by adopting laws (for example, abolishing the death penalty on the basis of Protocol No. 6) or by implementing various reforms (improving the conditions of detention in penitentiary institutions), the state implements standards and requirements of the Convention, it is extremely important that judges understand and apply the Convention when dealing with concrete cases. The process of applying the Convention involves both judges of the European Court of Human Rights in Strasbourg (hereinafter the Strasbourg Court or the Court) and judges of various judicial instances in the States parties. At the same time, the manner in which these judges apply the Convention varies greatly.

The concept of the Convention is not reduced to the text of this international legal document and its Protocols. It implies first of all the rich case-law of the Strasbourg Court (hereinafter – the case-law), in which the Court interprets specific rights and freedoms enshrined in the Convention. By adopting specific court decisions, the Court establishes standards significance of which go beyond the particular case (*Ireland v. the United Kingdom, 01.18.1978, Series A, no. 25, p. 154*). Therefore, the application of the Convention by domestic courts, the determination of the scope of specific rights and correct understanding of the main provisions of the Convention are impossible without the case-law and standards established by it

(Recommendation of the Committee of Ministers of the Council of Europe of December 18, 2002 Rec. (2002) 13: www.coe.int).

Although judges of both the Strasbourg Court and domestic courts are charged to apply the Convention, the principles and methods of their work, as well as their jurisdiction, are characterised by certain specificities.

For the judges of the Strasbourg Court, the Convention is the main source of law, since the Court decides whether applications lodged before it meet the requirements of the Convention and its case-law. For judges of domestic courts, the Convention serves an additional source of law when examining criminal, civil, administrative and other types of cases. The Strasbourg Court further relies on the legislation and case-law of the States parties.

The main purpose of the Strasbourg Court is to establish a breach of or compliance with the standards of the Convention by the State party. A judge of a domestic court checks the compliance of the actions by state bodies with the requirements of the Convention. The different legal status of the Convention within the domestic legal system predetermines the differences and peculiarities of the jurisdiction of domestic courts.

Although domestic courts are obliged to apply the Convention and its case-law, in some instances the application of the case-law without amending the national law is rather difficult. This happens when legislation imperatively establishes restrictions that are contrary to the Convention, for example, if the law establishes an unreasonably short limitation periods, which the Strasbourg Court found to be in violation of Article 6 of the Convention.

In the process of practical application of the Convention by domestic courts, an important issue of access to the case-law often arises. Judges in the States parties use the state language at work, and they are not required to be fluent in the official languages of the Strasbourg proceedings. To solve the problem of providing courts with relevant case-law in understandable languages remains one of the central issues of the implementation of the Convention.

The effectiveness of the Convention in the States parties depends not only on the execution of specific Court judgments in relation to a particular state. It largely depends on the recognition and acceptance of the case-law by the domestic courts. To a certain extent, there is a dialogue between the judges of the Strasbourg Court and the domestic courts of the States parties. This is primarily reflected in the fact that judges in Strasbourg carefully consider opinions and arguments of domestic courts. In assessing the actual circumstances of the case, the Strasbourg Court relies on the facts established by domestic courts.

In practice, there are also cases when judges of domestic courts do not agree with the interpretation adopted in Strasbourg (*Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights, 2016, p. 36*).

The work of the judges of the Strasbourg Court are based on certain principles, some of which deserve particular attention, such as **the fourth instance doctrine, the absence of Doctrine of precedent, the Convention as a «Living Instrument», the comparative interpretation or autonomous concepts**. The specificities of these principles make obvious the difference

between the working methods of the judges of the Strasbourg Court and those of judges in the domestic court.

With the entry into force on 1 August 2018 of Protocol No. 16 in relation to 10 States parties (Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia and Ukraine) there appeared a new form and the possibility of a dialogue between the Strasbourg Court and domestic courts. The Supreme and Constitutional Courts are given the opportunity to request an advisory opinion from the Strasbourg Court on the points of interpretation and application of the rights and freedoms enshrined in the Convention and its Protocols. The advisory opinion, which is adopted by the Grand Chamber of the Court, contains the reasons and arguments of the Court, but it is not binding on domestic courts.

The prerequisite for applying to the Strasbourg Court for an advisory opinion is that a request must originate in pending domestic proceedings currently being heard by a highest court or tribunal or Constitutional Court. The first advisory opinion was adopted on 10 April 2019 at the request of the French Court of Cassation (*Cour de cassation*), and it concerns the issue of recognition a birth certificate issued abroad to a child born abroad as a result of a gestational surrogacy arrangement.

This opinion is noteworthy in that the Grand Chamber for the first time defined the boundaries of advisory opinion requests. It confirmed that the Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in light of Convention law, or to rule on the outcome of the domestic proceedings. Its role is strictly limited to furnishing an opinion regarding the questions submitted with the requirements of the Convention and its case-law.

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THE EXPERIENCE OF THE UNITED KINGDOM CASE LAW IN FORMING OF HUMAN RIGHTS PURSUANT TO THE ECHR JUDICIAL PRACTICE

Key words: *European Court of Human Rights, ratio decidendi, Constitution.*

The European Court of Human Rights entitles its own practice as a case-law. The basis of the judicial precedent in the judicial practice of the ECHR is the principle of *ratio decidendi* (from Latin – the basis for resolution), and the precedent manifests itself in the fact that in the decision of cases the Strasbourg court tends to follow as a whole the approaches that were used by them earlier, if not recognized as necessary to change them. In particular, in the motive part of the judgment (imperative conclusion), the court, instead of reproducing the arguments it has previously expressed, may refer to the