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**PROTOCOL 16 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS
AND FUNDAMENTAL FREEDOMS AND THE FIRST ADVISORY
CONCLUSION OF THE EUROPEAN COURT OF HUMAN RIGHTS**

Key words: *European Court of Human Rights, source of law, The European Convention on Human Rights, advisory conclusion, Supreme Court.*

On August 1, 2018, Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) entered into force. The Protocol provides the highest courts of its member countries with the right to apply to the European Court of Human Rights (ECHR or the Court) for advisory conclusions on «the fundamental issues of the interpretation and application of the rights guaranteed by the Convention and the protocols thereto».

Today, the Protocol entered into force only for the ten countries that have ratified it. The last of these were Ukraine and France, which ratified on April 12, 2018 [1]. The ECHR has already brought its internal documents in line with the Protocol: a new version of the Rules of Court and Guidelines for the implementation of the advisory conclusion procedure, which was approved by the ECHR Plenum as early as September 18, 2017, were issued [2].

In accordance with the Protocol, the State party itself determines which of the courts in the national legal system will have this right. Ukraine by the Law «On the ratification of Protocols No. 15 and No. 16 to the Convention on Human Rights and Fundamental Freedoms» No. 2156-VIII dated October 5, 2017, has designated the Supreme Court as such. But today in the Verkhovna Rada two bills are considered, which specify the subject of the appeal to the ECHR for the advisory conclusion: the first is the draft law «On amendments to certain legislative acts of Ukraine in connection with the ratification of Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms» No. 8535 dated June 27, 2018, the second – «On Amendments to Certain Legislative Acts of Ukraine in Connection with the Ratification of Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms» No. 8535-1 dated July 06, 2018. The first draft stipulates that the Grand Chamber of the Supreme Court of Ukraine applies to the ECHR, and the other envisages that the cassation instance may, on its own initiative, decide on an appeal to the European Court of Human Rights with a request for an advisory conclusion. That is, Ukraine has not yet decided who will appeal to the ECHR for providing an advisory conclusion.

What are the issues that the ECHR will consider within the framework of this procedure, and will it be useful for Ukraine? After all, in itself, the

concept of «fundamental questions of interpretation and application of rights» is sufficiently broad.

The first request, filed by the Court of Cassation of France on 16 October 2018, stipulated the delisting of the so-called «positive obligations» under Article 8 of the Convention in the field of surrogacy, in particular in cases where the «legal» mother does not have a genetic connection with the child, which gave birth to a surrogate mother. The request is related to the fact that surrogate motherhood is prohibited in France, but some French citizens use services of surrogate mothers abroad (in particular in Ukraine) [3] and appeal to the French authorities to recognize children born of surrogate mothers abroad as their own children. In the case of *Menneson v. France* [4] and in some cases that followed this precedent, the ECHR has already determined that in some cases the French authorities are required to register such children. In those cases, a person who wanted to be a legal father in France was also the biological father of children. However, new cases violate new, difficult ethical and legal issues, in particular whether the same principle applies to legal motherhood, especially if the person who claims to be registered as a legal mother does not have a biological connection with the child [5]. This request shows that queries of a character will have greater chances to be considered by the Grand Chamber of the ECHR: this is primarily the «new» issue facing the courts of developed countries of the EU: bioethics, data processing, immigration, etc.

On April 10, 2019, the ECHR provided the Cassation Court of France with its first advisory conclusion. The ECHR has determined that if a person is designated as a mother in accordance with the legislation of a foreign country (that is, outside of France), Article 8 of the Convention provides for the obligation for the French authorities to provide for a mechanism by which such a woman would be able to be recognized as a mother France. However, this recognition does not necessarily have to be automatic: this can also be done through the adoption process [6].

As to the procedural aspect of this conclusion, according to the judge of the ECHR, Hanna Yudkivska, «The court seized the opportunity to determine the boundaries of advisory conclusions: it confirmed that it has no jurisdiction to assess the facts of the case or the views of the parties on the interpretation of national law in the light of the Convention, nor for a decision on the outcome of the national proceedings. His role is limited to giving his conclusion on the questions raised, and the requesting court makes its findings based on the Court's conclusion on the relevant provisions of national law and the outcome of the case. Moreover, the Court's conclusion should be limited to matters directly related to ongoing national proceedings» [7].

References:

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2. Guidelines on the implementation of the advisory-conclusion procedure introduced by Protocol No. 16 to the Convention [Електронний ресурс]. – Режим доступу: https://www.echr.coe.int/Documents/Guidelines_P16_ENG.pdf
3. Judgment in case Laborie c. France (Application № 44024/13) 19 January 2017 [Електронний ресурс]. – Режим доступу: [http://www.lagbd.org/index.php/Arr%C3%AAt_de_la_CEDH_AFFAIRE_LABORIE_c._FRANCE_\(eu\)](http://www.lagbd.org/index.php/Arr%C3%AAt_de_la_CEDH_AFFAIRE_LABORIE_c._FRANCE_(eu))
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7. Anna Yudkivska, Facebook, April 11, 2019 [Електронний ресурс]. – Режим доступу: <https://www.facebook.com/profile.php?id=100009583042326>

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TO THE QUESTION OF RES JUDICATA FINALITY PRINCIPLE IN THE PRACTICE OF COURT JUDGEMENTS IN EUROPEAN COURT OF HUMAN RIGHTS PRACTICE

Key words: *res judicata, legal certainty, finality of decisions, court.*

Principle *res judicata* – finality of court judgement is approved in the international level and guaranteed by clause 1 of the Article 44 of the Convention of human rights and principal liberties [1]. Principle of judgement finality is the basic part of the supremacy of law and legal certainty principle. On its essence principle *res judicata* is a solved case (*res judicata pro veritate habetur* – court judgement is to be considered as the truth) it means the finality of court judgement which is in force and it cannot be revised. *Res judicata* origin is even in ancient Roman judicial procedure, which history is determined by three periods: 1) *legis actions* (*legis actio* procedure), 2) *actiones per for mulas* (formulary procedure), 3) extraordinary procedure [2, p. 114].

According to Articles 129, 129-1 of the Constitution of Ukraine the judge administrating justice is independent and is ruled by supremacy of law. Court