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**Protection of the rights of persons with disabilities through the European Court of
Human Rights legal positions: lessons for Ukraine**

Abstract

The article deals with the analysis of the current practice of the European Court of Human Rights in the field of protection of the rights of persons with disabilities. Nowadays, the role of the European Court of Human Rights in the Ukrainian case law while solving specific cases is growing. The article analyzes the topical for Ukraine precedents in the focus of cases consideration that deals with the violation of Article 2 (Right to life), Article 3 (Prohibition of torture) and Article 5 (Right to liberty and security) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Keywords: persons with disabilities, precedent, protection of constitutional rights.

**Ochrona praw osób niepełnosprawnych przez pryzmat orzecznictwa Europejskiego
Trybunału Praw Człowieka: propozycje dla Ukrainy**

Streszczenie

Artykuł jest poświęcony analizie aktualnego orzecznictwa Europejskiego Trybunału Praw Człowieka w zakresie ochrony praw osób niepełnosprawnych. Na dzień dzisiejszy w sądownictwie ukraińskim przy rozpatrywaniu konkretnych spraw sądowych zwiększa się rola orzecznictwa Europejskiego Trybunału Praw Człowieka. Artykuł zawiera analizę aktualnych dla Ukrainy precedensów ze szczególnym uwzględnieniem spraw związanych z naruszeniem prawa do życia (art. 2), zakazu tortur (art. 3) oraz prawa do wolności i bezpieczeństwa osobistego (art. 5) według Europejskiej konwencji o ochronie praw człowieka i podstawowych wolności.

Słowa kluczowe: osoby niepełnosprawne, precedens, ochrona praw konstytucyjnych

I. Introduction

The international governmental and non-governmental organizations whose competence is to protect the rights and freedoms of human and citizen are very important in ensuring the rights and freedoms of human and citizen in Ukraine. Under part 4 Article 55 of the Constitution of Ukraine¹ everyone after exhausting all domestic legal remedies has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organizations of which Ukraine is a member or participant. In particular, the European Court of Human Rights monitors the observance of human rights in the member states of the Council of Europe, one of which is Ukraine. Experience has shown that the number of cases considered by the European Court of Human Rights in relation to Ukrainian citizens increases every year. The European Court of Human Rights has issued in 2002 one decision against Ukraine, in 2003 - 6, in 2004 - 13, since the beginning of 2005 - 54 decisions. As of the end of the first half of 2016, there are 804 decisions of the European Court of Human Rights in respect of Ukraine.²

This article analyzes those ECHR decisions that've had the greatest impact on the law enforcement practice and contributed to the legislation changes in order to harmonize it with the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It should be highlighted that taking into account the European Court of Human Rights decisions in the law enforcement practice of Ukraine is just the beginning. If the practicing lawyers and courts have already begun to apply the decisions of the European Court of Human Rights, then the legislative and executive authorities are only beginning to analyze certain decisions of the European Court of Human Rights when making decisions, including on the «sensitive» category of persons - persons with disability.

The classification of the European Court of Human Rights (hereinafter referred to as the ECHR) practice that deals with the protection of the rights of persons with disabilities due to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) may be carried out according to the criterion of the violation of Article 2 (Right to life), Article 3 (Prohibition of torture) and Article 5 (Right to liberty and security) of the Convention. Let's analyze them in more detail.

¹ The Constitution of Ukraine of June 28, 1996, // The Bulletin of the Verkhovna Rada of Ukraine.-1996.-№30.-p.141.

² The Decisions of the European Court of Human Rights in cases against Ukraine // Official site of the Ministry of Justice of Ukraine. URL: <http://old.minjust.gov.ua/19612>.

II. Article 2. Right to life

In the case of *Jasinskis v. Latvia*³ a deaf and mute son of the applicant died in the police department. The boy who suffered from serious head injuries after falling down the stairs was taken to the local police department and placed to the sobering-up room, where he spent 14 hours, since the police officers considered him drunk. The applicant also complained about the ineffectiveness of further investigations into the death of his son.

The European Court of Human Rights held that there has been a violation of the substantive aspect of Article 2 (the right to life) of the Convention. This confirms that Art.2 of the Convention enjoins the state not only to refrain from the "intentional" taking of life but also to take appropriate steps to safeguard the lives of those within its jurisdiction. Where the authorities decide to place and maintain in detention persons with disabilities, they should demonstrate special care in guaranteeing such conditions as corresponding to their special needs resulting from their disability.

However, in a particular case, the police did not conduct a medical examination during an individual's arrest, as required by the European Committee for the Prevention of Torture (CPT). The police never gave the detained any opportunity to provide information about his state of health, even after he kept knocking on the doors and the walls of the sobering-up cell. Taking into account that he was deaf and mute, the police had a clear obligation arising from national and international standards to at least provide him with a pen and a piece of paper to enable him to communicate his concerns. The ECHR, therefore, concluded that the police failed to fulfill their duty to safeguard the life of the applicant's son by providing him with adequate medical treatment.

Despite that, the ECHR held that the investigation of the circumstances of the death of the applicant's son was not effective, which is the violation of Art. 2 of the Convention in its procedural aspect.

In the case of *Nencheva and Others v. Bulgaria*⁴ 15 children and young adults during the December 1996 –March 1997 died at a state institution for children with serious mental disabilities because of the cold and insufficient quantities of food, medicines and basic essentials. The manager of the home, observing the problems, had tried without success on several occasions to alert all the public institutions which had direct responsibility for funding the home and which could have been expected to act.

The ECHR found a violation of Article 2 (the right to life) of the Convention in that the authorities had failed in their duty to protect the lives of the vulnerable children placed in their care from a serious and immediate threat. The authorities had also failed to conduct an effective official investigation into the deaths, occurring in highly exceptional circumstances. The ECHR considered

³ Case *Jasinskis v. Latvia*. № 45744/08. 21 December 2010.

⁴ Case *Nencheva and Others v. Bulgaria*. № 48609/06. 18 June 2013.

that the authorities should have known that there was a real risk to the lives of the children in the home and that they had not taken the necessary measures within the limits of their powers.

The children and young people under the age of 22 placed in the home were vulnerable persons suffering from severe mental and physical disabilities, who had either been abandoned by their parents or had been placed in the home with their parents' consent. All of them were entrusted to the care of the State in a specialized public facility and were under the exclusive supervision of the authorities.

III. Article 3. Prohibition of torture

The case of *Price v. the United Kingdom*⁵ is about the applicant, who suffered from serious disabilities. She was four-limb deficient as a result of phocomelia due to Thalidomide. She also suffers from problems with her kidneys. She was committed to prison for contempt of court during the civil case hearing. She was kept at the police cell one night, where she was forced to sleep in her wheelchair since the bed was not specially adapted for a disabled person, and where she was complaining about the cold. Subsequently, she spent two days in a normal prison, where, in order to go to the toilet, she was dependent on the help of male prison officers.

The Court held that there was a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. The Court considers that to detain a severely disabled person in conditions where she is dangerously cold, with the risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention.

In the case of *Vincent v. France*⁶ the ECHR considered the applicant's complaint, who was currently detained and serving a ten-year prison sentence imposed in 2005. The applicant, paraplegic since an accident in 1989, was autonomous, but could not move around without the aid of a wheelchair. In particular, he complained that the conditions in which he was detained in different prisons were not adapted to his physical disability.

The Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention since the paraplegic applicant could not move about the Fresnes Prison independently, that was particularly unsuited to the imprisonment of persons with a physical handicap who could move about only in a wheelchair. There was no evidence of any positive intention to humiliate or debase the applicant. However, the Court considered that to detain a handicapped person in a prison where he could not move about and, in particular, could not leave

⁵ Case *Price v. the United Kingdom*. № 33394/96. 10 July 2001.

⁶ Case *Vincent v. France*. № 6253/03. 24 October 2006.

his cell independently, amounted to “degrading treatment” within the meaning of Article 3 of the Convention.

The ECHR in the case of *Z. H. v. Hungary*⁷ considered the complaint of the deaf and dumb applicant, who could not use a sign language and was illiterate. He complained that his nearly 3-months detention amounted to inhuman and degrading treatment.

The Court concluded that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. The Court concluded that despite the authorities laudable but belated efforts to address his situation – the applicant’s incarceration without the requisite measures taken within a reasonable time resulted in a situation amounting to inhuman and degrading.

The Court also concluded that there was a violation of Article 5 § 2 (the right to freedom and security) of the Convention. Taking into consideration numerous disabilities of the applicant, the Court was not persuaded that he could be considered to have obtained the information required to enable him to challenge his detention. Furthermore, the ECHR further admitted that the authorities did not make any truly “reasonable steps” – a notion quite akin to that of “reasonable accommodation” in Articles 2, 13 and 14 of the UN Convention on the Rights of Persons with Disabilities – to address the applicant’s condition, in particular by procuring for him assistance by a lawyer or another suitable person.

In the case of *Arutyunyan v. Russia*⁸ the ECHR considered the case of a wheelchair-bound applicant with numerous health problems including a failing renal transplant, extremely poor eyesight, insular diabetes and severe obesity. The applicant was kept in a cell on the last floor of the four-story facility building without a lift; medical and administrative facilities were on the ground floor. Since there wasn’t the lift the applicant should have gone up and down the stairs systematically to get hemodialysis and other necessary medical care.

The Court ruled that there has been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. The Court found that the domestic authorities failed to handle the applicant in a safe and appropriate manner consistent with his disability, denying him effective access to the medical facilities, outdoor exercise, and fresh air. In particular, the Court observed that at least four times a week for almost fifteen months the applicant, a disabled and extremely overweight individual who depended on a wheelchair for mobility, had to descend and ascend four flights of stairs on his way to and from the lengthy, complicated and tiring vital medical procedures. These forced walks undoubtedly inflicted unnecessary pain on the applicant and subjected him to an unreasonable risk of serious health damage. That’s why the applicant refused to

⁷ Case *Z.H. v. Hungary*, № 28973/11. 8 November 2011.

⁸ Case *Arutyunyan v. Russia*. № 48977/09. 10 January 2012.

leave the cell to be taken for a walk in the recreation yard. The applicant was so frustrated and stressed that he occasionally refused to leave his cell to take life-supporting hemodialysis.

In the case of *Zarzycki v. Poland*⁹ the applicant was with disability (both his forearms have been amputated). The applicant complained about the terms of imprisonment: he spent three years and four months in prison without proper medical care, needed from the point of view of special needs and without reimbursement to him of the cost of biomechanical prosthetics of his hands, which he considered humiliating. The applicant argued that he had to rely on other prisoners who helped him with daily hygiene and dressing.

The ECHR ruled that in this case there wasn't a breach of Article 3 (prohibition of inhuman or degrading treatment) of the Convention and highlighted the administration attention paid to the applicant. It was true that the Court had often criticised the scheme of providing routine assistance to a prisoner with a physical disability through cellmates, even if they were volunteers and even if their help had been solicited only when the prison infirmary was closed. In the particular circumstances of the present case, however, the Court did not find any reason to condemn the system which had been put in place by the authorities to secure the adequate and necessary aid to the applicant.

As regards prostheses, since the main type of the mechanical prostheses was available and was given for free, and bearing in mind that a refund of a small part of the cost of bio-mechanic prostheses was also available, the Court considers that the Republic of Poland cannot be said to have failed to discharge its obligations under Article 3 by not paying the full costs of a prosthetic device of an advanced type. The competent authorities provided the applicant with the regular and adequate assistance his special needs warranted. Moreover, there is no evidence in this case of any incident or positive intention to humiliate or debase the applicant. The Court holds, therefore, that even though a prisoner with amputated forearms is more vulnerable to the hardships of detention, the treatment of the applicant in the circumstances of the present case did not reach the threshold of severity required to constitute degrading treatment contrary to Article 3 of the Convention.

The case of *Grimailovs v. Latvia*¹⁰ was about that in June 2002 the applicant, who had a metal insert in his spine after breaking his back two years earlier, was given a five and a half year prison sentence. He complained, inter alia, that the prison facilities were unsuitable for him as he was paraplegic and wheelchair-bound. In 2006 he was conditionally released.

The Court ruled that there has been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. The applicant had been detained for nearly two-and-a-half years in a regular detention facility which was not adapted for persons in a wheelchair. Moreover,

⁹ Case *Zarzycki v. Poland*. № 15351/03. 6 March 2013.

¹⁰ Case *Grimailovs v. Latvia*. № 6087/03. 25 June 2013.

the applicant had to rely on his fellow inmates to assist him with his daily routine and mobility around the prison, even though they did not have the necessary qualifications. Although the medical staff had visited the applicant in his cell for ordinary medical check-ups, they had not provided any assistance with his daily routine. The State's obligation to ensure adequate conditions of detention included making provision for the special needs of prisoners with physical disabilities. The State could not absolve itself from that obligation by shifting the responsibility to cellmates. The conditions of the applicant's detention in view of his physical disability and, in particular, his inability to have access to various prison facilities and sanitation facilities, independently and the lack of any organised assistance with his mobility around the prison or his daily routine, had reached the threshold of severity required to constitute degrading treatment.

The similar situation was in the case of *Semikhvostov v. Russia*¹¹, where the applicant, who was wheelchair-bound asserted that a correctional facility where he had been detained for almost three years was not adapted for the disabled. He also complained that he had no effective remedies at the national level regarding these complaints.

The Court ruled that there has been a violation of Article 3 (prohibition of inhuman and degrading treatment) of the Convention. The Court holds that the conditions of the applicant's detention, in particular, his inability to have access to various premises independently, including the canteen and sanitation facilities, and in such a situation the lack of any organised assistance with his mobility around the facility or his daily routine, must have caused him such unnecessary and avoidable mental and physical suffering, diminishing his human dignity, that this amounts to inhuman and degrading treatment. The ECHR also hold that there has been a violation of Article 13 of the Convention (the right to an effective remedy).

In the case of *Asalya v. Turke*¹² the ECHR considered the application of a Palestinian paraplegic who is wheel-chair bound, who complained about the conditions of his detention while pending deportation in Kumkapı Foreigners' Admission and Accommodation Centre. The applicant claimed that there were no provisions at the Kumkapı Foreigners' Admission and Accommodation Centre catering for the needs of detainees using wheelchairs, such as lifts or suitable toilet facilities.

The Court reached the conclusion that there has been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the account of the conditions of the applicant's detention in Kumkapı Foreigners' Admission and Accommodation Centre. The Court highlighted that there was no evidence in this case of any positive intention to humiliate or debase the applicant. The Court nevertheless considered that the detention of the applicant in conditions where he was denied some of the minimal necessities for a civilised life, such as sleeping on a bed and being able to use

¹¹ Case *Semikhvostov v. Russia*. № 2689/12. 6 February 2014.

¹² Case *Asalya v. Turkey*. № 43875/09. 15 April 2014.

the toilet as often as required without having to rely on the help of strangers, was not compatible with his human dignity and exacerbated the mental anguish caused by the arbitrary nature of his detention, regardless of its relatively short period. In these circumstances, the Court found that the applicant was subjected to degrading treatment.

In the case of *Helhal v. France*¹³ the ECHR considered the complaint of the applicant, who suffered from incomplete paraplegia and urinary and fecal incontinence. The applicant complained that taking into account his hard form of disability his continuing detention would amount to inhuman or degrading treatment.

The Court found the violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. The Court took the view that the applicant's continued detention was not in itself inhuman or degrading treatment. The inadequacy of the treatment and physical rehabilitation provided to him, and that the prison facilities were not adapted to his disability, led to the violation of Art. 3 of the Convention. The ECHR also noted that, in this case, assistance in taking shower, provided to the applicant by a cellmate, since there was no shower for persons with reduced mobility, was a failure to fulfill the state's obligations regarding health and safety.

The ECHR also considered the case of *Dorđević v. Croatia*¹⁴, concerning mother's complaints and her mentally retarded and physically disabled son. They stated that they had been persecuted, both physically and orally, for four years from the children living in the neighborhood and that the authorities were not able to protect them. These attacks forced the first applicant to feel deeply disturbed, frightened and worried. The applicants repeatedly complained in various instances. In addition, they repeatedly phoned the police, reported incidents and asked for help. After each call, the police arrived at the scene, sometimes too late, and sometimes only ordered the children to break or stop the noise. Law enforcers questioned several students who admitted that they had been cruel to the applicant, and despite this, their age did not allow them to be prosecuted.

This case concerned the state's positive obligations in the situation outside the sphere of criminal law, where competent state authorities were aware of serious harassment directed against a person with physical and mental disabilities. The ECHR ruled in particular that there was a violation of Art. 3 Convention (prohibition of inhuman or degrading treatment) in relation to the first applicant, concluding that the Croatian authorities have done nothing to end the harassment, despite their awareness of the systematic targeting of these harassments on a particular person and the fact that the future abuse was very likely to follow.

IV. Article 5. Right to liberty and security

¹³ Case *Helhal v. France*. № 10401/12. 19 February 2015.

¹⁴ Case *Dorđević v. Croatia*. № 41526/10. 24 July 2012.

In the case of *H. L. v. the United Kingdom*¹⁵ the ECHR considered the case of the autistic applicant, who was unable to speak and his level of understanding was limited. In July 1997, while at the day-center, he became particularly agitated, hitting himself. Subsequently, he was transferred to the hospital's intensive care unit of the hospital as an "informal patient". The applicant mainly alleged that his treatment as an informal patient in a psychiatric institution amounted to detention and that this detention was unlawful and that the procedures available to him for a review of the legality of his detention did not satisfy the requirements of Article 5 of the Convention (the right to liberty and security).

As a result of the lack of procedural regulation and limits, the Court observed that the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit. The Court, therefore, found that this absence of procedural safeguards failed to protect against arbitrary deprivations of liberty on grounds of necessity and, consequently, to comply with the essential purpose of Article 5 § 1 of Convention (the right to liberty and security). Finding that it had not been demonstrated that the applicant had available to him a procedure to have the lawfulness of his detention reviewed by a court, the Court held that there had been a violation of § 4 Article 5 (the right to lawful detention based on the urgent court order) of the Convention.

In the case of *Stanev v. Bulgaria*¹⁶ the ECHR considered the case of the applicant, who in 2000, following a request from his two relatives, was declared by court partially legally incapacitated on the grounds that he had been suffering from schizophrenia. In 2002 the applicant was placed contrary to his will under partial guardianship and placed in a social care home for people with mental disorders, situated near the village in a remote mountain location. On the basis of Article 5 of the Convention (the right to liberty and security), the applicant argued, inter alia, that he was deprived of his liberty illegally and unreasonably as a result of his being placed in the institution contrary to his will, and that it was not possible, in accordance with the law of Bulgaria, to obtain the verification of the lawfulness of imprisonment or compensation in court.

The ECHR found that in this case, the illegal detention of the applicant at the abovementioned institution constituted the violation of § 1 of Article 5 of the Convention (the right to liberty and security). He noted, in particular, that the decision on the placement of the applicant was illegal in the sense of paragraph 1 of Article 5 of the Convention, since none of the exceptions provided for in this article is applicable, in particular (e) § 1 Art. 5 of the Convention - the deprivation of liberty of "person of unsound mind ". After an expert psychiatric examination, which

¹⁵ Case *H.L. v. the United Kingdom*. № 45508/99. 5 October 2004.

¹⁶ Case *Stanev v. Bulgaria* [Grand Chamber]. № 36760/06. 17 January 2012.

was referred to by the authorities when the applicant was placed in the house, the applicant's guardian did not check whether there had been any change in his condition and had not met him. Therefore, this period was excessive, and the medical opinion issued in 2000 could not be regarded as a reliable reflection of the state of the applicant's mental health at the time of his placement (in 2002). In addition, the ECHR ruled that there had been a violation of § 4 of the Art. 5 of the Convention (the right to lawful detention based on the urgent court order) regarding the impossibility of the applicant to institute proceedings to verify the lawfulness of his detention by a court, as well as the violation of § 5 of Art. 5 of the Convention (the right to compensation) regarding the impossibility of filing an application for compensation for unlawful detention and the lack of consideration by the court of the lawfulness of his detention.

V. Conclusions

In summary, it can be concluded from the analyzed practice of the European Court of Human Rights that mostly the Court satisfies the applicants' complaints, emphasizing that the existence of only positive or only negative obligations of the state to ensure and guarantee the rights of disabled persons is not enough. Most often for effective legal protection, the implementation of both types of obligations can significantly influence and solve the problems that arise in the sphere of violation of the rights of disabled persons. The ECHR highlights the need for inclusive politics to be carried out by all states without exception, which should equally take into account the interests of all citizens while focusing on those for whom the protection by public authorities is vital. Moreover, the ECHR draws attention to the need to apply an individual approach to each case, not to generalize the application of the rules of the law, and to carefully investigate the circumstances of the cases, demanding a detailed verification of evidence and obtaining all possible medical and other opinions and recommendations. Despite the fact that the drawbacks of national legislation very often create obstacles to the effective implementation and protection of the rights of persons with disabilities, when it is difficult to consider legitimate court decisions as consistent with international standards, the ECHR recalls that each state that ratified the European Convention on Human Rights has taken the obligation to ensure the protection of the rights and freedoms guaranteed by the Convention, to everyone within its jurisdiction.

In this context the analysis of the ECHR practice is necessary, in fact, for the legislative and executive authorities. At the same time, making laws should take place in such way that effective implementation and protection of the disabled persons rights is carried out at the national level with a clear vector of the state policy directed to the adaptation of persons with disabilities to market

relations and active social life, based on the principles of social justice, nondiscrimination, as well as freedom and equality.

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